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Alfred S. Northrup

A

TREATISE

ON

MARINE, FIRE, LIFE, ACCIDENT

AND ALL OTHER

INSURANCES

INCLUDING MUTUAL BENEFIT SOCIETIES,

COVERING ALSO

GENERAL AVERAGE,

AND, SO FAR AS APPLICABLE,

RIGHTS, REMEDIES, PLEADING, PRACTICE AND EVIDENCE.

BY

JOSEPH A. JOYCE.

IN FOUR VOLUMES.

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LAW OF INSURANCE.

CHAPTER XXV.

BENEFICIARIES.

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SUBDIV. I. Beneficiaries, Generally: Who May Be: Interest: Designation and Change of.

§ 728. Beneficiaries, Generally—Designation of—Specified Classes—Equities.—The right of the member of a mutual benefit society to designate the beneficiary under a mutual benefit certificate is generally controlled by the statute of incorporation, charter, by-laws of the society, articles of association, or the fundamental rules of organization.[a] In

[a] Britton v. Supreme Council, 46 N. J. Eq. 102; 19 Am. St. Rep. 376; National etc. Aid Assn. v. Gonser, 43 Ohio St. 1; Caudell v. Woodward, 96 Ky. 646. "The constitution and by-laws of such an organization are elements of the contract of insurance. They meas-

most cases, these benefit societies are organized for the protection of persons standing in some specified relation to the members, and the statute of incorporation, charter, articles of association, or by-laws therefore designate certain classes or persons to whom the certificate shall be payable, and from whom the beneficiaries must be chosen. Where the classes are specified, or the manner or form of the designation of the beneficiary are also prescribed, these provisions should be complied with.[1] If there is a provision in the by-laws that the designation of beneficiaries may be waived by an indorsement upon the policy, which shall be signed and witnessed, it is held that a compliance with the terms of the provision is essential.[2] The

ure and determine the member's duties and liabilities, and not only these, but his rights as well (Supreme Lodge v. Knight, 117 Ind. 489); not only the private members, but the officers are under obligation to conform their conduct to them": Sourwine v. Supreme Lodge K. of P. 12 Ind. App. 447; 54 Am. St. Rep. 532, 535. See, also, note 19 Am. St. Rep. 790: "Where the statute designates the class of persons to be benefited, the fact that the designation of the beneficiary in a certificate issued by a beneficiary association was invalid, does not make the contract void; and on the death of the insured his executor is entitled to the money in trust for the benefit of those who were entitled to be named as beneficiaries at the time the contract was made": Note 52 Am. St. Rep. 560, citing Clarke v. Schwarzenberg, 162 Mass. 98; Shea v. Massachusetts etc. Assn. 160 Mass. 289; 39 Am. St. Rep. 475; National etc. Aid Assn. v. Gonser, 43 Ohio St. 1; Caudell v. Woodward, 96 Ky. 646. This note (52 Am. St. Rep. 543-579) is an exhaustive discussion of the law relating to such organizations and the designation, etc., of beneficiaries.

[1] Masonic Mut. Aid Soc. v. Bunch, 109 Mo. 578, 579; Di Messiah v. Gern (N. Y. 1894), 30 N. Y. Supp. 824; 63 N. Y. St. Rep. 172; March v. American Legion of Honor, 149 Mass. 512, 515, et seq.; American Legion of Honor v. Smith, 45 N. J. Eq. 466; Michigan Mut. B. Assn. v. Rolfe, 76 Mich. 146; Sanger v. Rothschild, 123 N. Y. 577; In re William Phillips Ins., L. R. 23 Ch. D. 235; Britton v. Royal Arcanum Supreme Council etc., 46 N. J. Eq. 102; 18 Atl. Rep. 675. But see Adams v. Grand Lodge A. O. U. W., 105 Cal. 321; 38 Pac. Rep. 914; Shea v. Massachusetts B. Assn., 160 Mass. 289; 35 N. E. Rep. 855; Clarke v. Schwarzenberg, 162 Mass. 98; 38 N. E. Rep. 17.

[2] Elliott v. Whedbee, 94 N. C. 115. That requirements in by-laws or constitution as to designation may be waived, see Hanson v. Minnesota Scand. Rel. Assn., 59 Minn. 123; 60 N. W. Rep. 1091; Adams v. Grand Lodge A. O. U. W., 105 Cal. 321; 38 Pac. Rep. 914.

beneficiary must be within the class prescribed by the charter or by-laws of the association or society,[3] or by the statute of the state under which the corporation is organized.[4] And if some person outside of the classes is designated or named as beneficiary, and upon the member's death the money is paid to such person, he will simply hold it as trustee for those who would have been entitled, under the charter or by-laws of the society, to have received the proceeds, if no beneficiary had been named. Such a designation is otherwise inoperative.[5] If a by-law specifies the persons to whom a benefit is payable, naming the widow first and others in a certain order, the widow has no vested right, and any one of those specified may be designated, even though it be a subordinate grove named last in the order

[3] Park v. Welch, 33 Ill. App. 188; Leaf v. Leaf, 92 Ky. 166, 173; 17 S. W. Rep. 354, and cases under last note.

[4] Britton v. Royal Arcanum Supreme Council, 46 N. J. Eq. 102; 18 Atl. Rep. 675; Shea v. Massachusetts B. Assn., 160 Mass. 289; 35 N. E. Rep. 855; 23 Ins. L. J. 214; Clarke v. Schwarzenberg, 162 Mass. 98; 38 N. E. Rep. 17; Armstrong v. Warren (N. Y. S. C. 1895), 64 N. Y. St. Rep. 291; 31 N. Y. Supp. 665; Neilson v. Trust Corp. of Ontario, 24 Ont. Rep. 517.

[5] American Legion of Honor v. Perry, 140 Mass. 580.

A resulting trust may arise in favor of the estate of the husband, where his life is insured, payable to his wife, and she dies during his lifetime, and this rule applies to a certificate by a mutual aid society of which the husband was a member, and the assessments of which were paid by him, and "while the rights of a wife and children are protected in the case of a policy of life insurance for their benefit, it has not yet been held by this court that if they die before the person effecting the insurance there would not be a resulting trust in his favor in the absence of language in the policy giving rights to the legal representatives of the wife and children. . . . . While under a by-law of the society Jonathan H. Haskins could not transfer the certificates without his wife's written consent, we are of opinion that this did not vest such interest in her that her next of kin would be entitled to the proceeds of the certificate if she died before him": Haskins v. Kendall, 158 Mass. 224; 35 Am. St. Rep. 490. See, also, Rollins v. McHatton, 16 Colo. 203; 25 Am. St. Rep. 260, and note; Tompkins v. Levy, 87 Ala. 263; 13 Am. St. Rep. 31, and note; note 11 Am. St. Rep. 723, 724; Harding v. Littlehale, 150 Mass. 100.

specified and even though said grove is an unincorporated voluntary association.[6] The courts, however, will not in all cases require a strict compliance with provisions as to the form of the designation of the beneficiary,[7] except, perhaps, where it may be a charter provision going to the life of the certificate or policy, in which case what has been held in certain courts to be a general rule as to corporations might obtain: that is, that compliance with charter provisions cannot be waived.[8] Equities, however, may arise which will prevent a change of beneficiaries, even though made in conformity with the laws of the order, as where the wife to whom the original certificate was issued has kept it alive by paying the assessments out of her own earnings, and has surrendered property to her husband on the faith that the fund would be hers, she has a superior equity in favor of herself and infant children residing with her, over adult children named as beneficiaries.[9] The courts will, as far as possible, endeavor to carry into effect the intentions of the parties, though the designation may not be strictly in compliance with the requirements of the by-laws.[10] So it is declared in a Wisconsin case that the court should construe the charter, constitution, rules, and regulations of a benefit society to promote the benevolent purposes of the order, and to give effect to the intentions of the member who pays the sums necessary to procure the benefit whenever it can properly be done.[11] If certain classes are specified, and the beneficiary is named in a policy to

[6] Finch v. Grand Grove etc. A. O. of D. (Minn. 1895), 62 N. W. Rep. 384. See Clarke v. Schwarzenberg, 162 Mass. 98; 38 N. E. Rep. 17; Shea v. Massachusetts B. Assn., 160 Mass. 289; 35 N. E. Rep. 855.

[7] Edison v. New England Com. Trav. Assn., 144 Mass. 591. See Carmichael v. Northwestern Mut. B. Assn., 51 Mich. 494. See sec. 746, herein.

[8] See Head v. Providence Ins. Co., 2 Cranch (U. S.), 137. But see secs. 35, 36, herein.

[9] Leaf v. Leaf, 92 Ky. 167; 17 S. W. Rep. 354. See Jory v. Supreme Council American L. of H., 105 Cal. 20; 26 L. R. Annot. 733; 38 Pac. Rep. 524, and sec. 746, herein.

[10] Estate of Madeira, 16 Phila. (Pa.) 399; Addison v. New England Com. Trav. Assn., 144 Mass. 591. See Leaf v. Leaf, 92 Ky. 167; 17 S. W. Rep. 354; Klotz v. Klotz (Ky. 1893), 22 S. W. Rep. 551; Shea v. Massachusetts B. Assn., 160 Mass. 289; 35 N. E. Rep. 855.

[11] Renner v. Bohemian Slav. B. Soc., 89 Wis. 404; 62 N. W. Rep. 80.

the plaintiff's deceased husband, the burden is on the plaintiff to show that such beneficiary is not within the required class.[12] So a change of the beneficiary must be to one of the specified class.[13] Again, if under the charter and rules governing an organization, a member cannot designate as beneficiary a person who is neither a member of his family, a blood relative, nor dependent on him, the beneficiary must be of one of these specified classes. So it was held that the designation of a person as "foster mother," where it appeared she did not belong to any of these classes, was held invalid, and in such a case, if a member survives the insured, who belongs to one of these classes, such as the father of the member, he will be entitled to the fund.[14]

§ **729. Insurable Interest in Beneficiary — Necessity of.**—We have discussed elsewhere the question of the necessity of an insurable interest in the beneficiary or assignee of a regular life insurance policy.[15] But in regard to the insurable interest of a beneficiary under a certificate in a mutual benefit, benevolent, or fraternal organization, the better rule seems to be that if the contract is not procured by the beneficiary, but is made with the member himself, and at his instance and request, the beneficiary is not required to have an insurable interest on the life of the member, except in those cases where the statute of incorporation, charter, by-laws, or articles of association impose restrictions upon the designation of the beneficiary, or provide that he shall have an insurable interest.[16]

[12] Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131; 36 N. E. Rep. 429. See Whitehurst v. Whitehurst, 83 Va. 153.

[13] Northwestern Mas. Aid Assn. v. Marshall, 10 Pa. Co. Ct. 270. See sec. 744, herein.

[14] Gibbs v. Anderson (Ky. Sup. Ct. 1895), 16 Ky. Law Rep. 397.

[15] See chapters on insurable interest, herein.

[16] Freeman v. National B. Soc., 42 Hun (N. Y.), 252, and cases noted in text and notes following. In this case the court said: "The objection that the plaintiff was not shown to have an insurable interest in the life of the insured was met by the recital in the application that she was a creditor. This was the only evidence upon the point, and therefore was not contradicted. But the plaintiff did not procure the insurance. The insured did that, and named the plaintiff as beneficiary. There was nothing in the charter or statute under

So the court in a New York case, per Follett, C. J., says:[17] "The by-laws impose no limitation on the persons to whom certificates should be payable. It was held in Massey v. Mutual Relief Society of Rochester[18] that there being no restriction in the act under which the society was incorporated against making a certificate payable to a person in nowise related to the member, that a certificate issued to a stranger was not void as a wager policy. In that case the certificate was issued in favor of a person not related to the member, and who was not a member of the society, but in the case at bar the certificate was issued in favor of a member of the order. Under the statute and by-laws a member of this corporation can legally direct the sum to become due at his death to be paid to a stranger having no insurable interest in his life." [19] And in a comparatively recent case in the same state[20] the court, per Peckham, J., says: "The by-law provides not only for the well-being of its members and for the furnishing of substantial aid to their families, but it adds the words 'or assigns,' showing that the company is not restricted in its objects to the immediate families of its members, but the members are themselves at liberty to designate another than a member of their family as beneficiary. As the members

which the society was organized forbidding the insured to make the policy payable to whomever he should appoint, and there is no evidence tending to impeach the good faith of the transaction on the part of the insured. The defendant, therefore, must pay as it has agreed": Id. 257, per Landon, J., citing Olmstead v. Keyes, 85 N. Y. 593; Bickerton v. Jacques, 28 Hun (N. Y.), 122; Massey v. Mutual Relief Soc., 102 N. Y. 523; affirming 34 Hun (N. Y.), 254. Contra, see Michigan cases noted below, under this section.

[17] Sabin v. Phinney, 134 N. Y. 423, 427; 31 N. E. Rep. 1087; Sabin v. Grand Lodge A. O. U. W., 6 N. Y. St. Rep. 151. The statute (Laws N. Y. 1877, c. 74, sec. 4), provides that the beneficiary fund "may be set apart and provided to be paid over to the families, heirs, or representatives of deceased, or disabled members, or to such person or persons as such deceased member may, while living, have directed": See, also, 28 N. Y. St. Rep. 45; affirmed, 134 N. Y. 423. Olmstead v. Keyes, 85 N. Y. 593, is cited in 6 N. Y. St. Rep. 155, as supporting the point, while Courmack v. Lewis, 15 Wall. (U. S.) 643, and Warnock v. Davis, 104 U. S. 775, are cited as not in harmony with the decisions of New York state on this point.

[18] 102 N. Y. 523.

[19] Citing Niblack on Mutual Benefit Societies, sec. 178.

[20] Sulz v. Mutual Res. Fund L. Assn., 145 N. Y. 563, 573; 40 N. E. Rep. 242.

are not in any way restricted in the naming of a beneficiary by any by-law of the company, or by its constitution, if there is any beneficiary named in the certificate or policy itself, that person is the one to whom the money shall be distributed." In a Pennsylvania case, upon the question whether "heirs" had an insurable interest, the court, per Thompson, J., said: "The contention that the heirs have no insurable interest . . . . has no substantial basis. The certificates provide that by reason of membership, the devisees or, in case of no will, the heirs are to receive the designated sums. That a person, however, has an insurable interest in his own life, and can insure it for his heirs, or even a stranger, cannot be questioned.[21] These contracts, however, were made in good faith, without any misrepresentation, and in the form prescribed by the laws of the state in which they were made, and they were not wagering contracts in any sense." [22] And it is decided in another case in the same state that a benefit may be made payable to one who is not related to the member, nor a creditor, where the by-laws provide for a new direction of the fund, and do not provide that the beneficiary shall be the widow or children.[23] So a beneficiary need not have an insurable interest to entitle him to the fund as against creditors, the fund being contributed by the members of the fire department relief association as a guaranty.[24] If a beneficiary has no insurable interest and furnishes the money for the premiums, but there is a conflict of evidence whether it is furnished expressly for that purpose, it is a question for the jury, as between the executor and the beneficiary, as to whom the fund shall go.[25] Again, in a case in Missouri the constitution of the association provided that "the object and intention of this association is to give financial aid to the widows, orphans, heirs, and devisees of deceased members, and for no other purposes whatever," but neither the constitution

[21] Citing Scott v. Dickson, 108 Pa. St. 6; Beneficial Assn. v. Blue, 120 Ill. 121.

[22] Northwestern Mas. Aid Assn. v. Jones, 154 Pa. St. 99; 26 Atl. Rep. 253.

[23] Mulderick v. Ancient O. U. W., 155 Pa. St. 505.

[24] In re Zinn's Estate (Pa. D. Ct.), 2 Pa. Dist. R. 801; 14 Pa. Co. Ct 33.

[25] Chidester v. Yard, 155 Pa. St. 483.

or by-laws contained any provision as to a change or designation of a beneficiary or issue of new certificates. The question of insurable interest arose, and the court, per Gantt, P. J., after considering the rule that in life policies there must be an insurable interest, says: "But will this rule apply to these benevolent associations? By the statute authorizing their creation, they are declared not to be insurance companies. The courts have not agreed how far the principles governing life insurance generally should be applied. The supreme court of Michigan in Mutual Benefit Association v. Hoyt,[26] held that a contract by the association 'to pay Enos Hoyt, friend of Isaiah Phaw, of Jackson,' was on its face a mere wager policy, and contrary to public policy; and that the defense was that of the public, and not of the defendant, as the defendant, having received the premiums, 'was in no position to interpose such a defense.' The effect of this decision would be to deny the member the right to designate a beneficiary who has no insurable interest in his life. On the contrary, the supreme court of Illinois, in Benefit Association v. Blue,[27] held 'that as a member might, under

[26] 46 Mich. 473. But see Carmichael v. Mutual B. Assn., 51 Mich. 494, 496, where the court, per Graves, J., says of this case: "In Hoyt's case, the whole transaction was palpably colorable and fraudulent. A man, already dying from dissipation, was seized upon as a profitable subject for speculative insurance. His life, according to the ideas of insurance, was worth nothing. He was the merest clay in the hands of Hoyt. For a price the latter bargained with him to submit to insurance at Hoyt's expense and for Hoyt's benefit, and from the inception of the scheme to the death of the subject he was kept saturated with liquor. There was no relation by blood or marriage, and the only pretense of family connection was what was agreed upon at the very time in order to simulate a necessary condition." In Smith v. Pinch, 80 Mich. 332, the statute of incorporation provided that the beneficiary must have an insurable interest, but the court held that the beneficiary must have an insurable interest on the ground of public policy.

[27] 120 Ill. 121. In this case the court said: "Had this policy been taken out by Blue on the life of Bailey, without his knowledge or consent, and had the premiums been paid by him, it would manifestly fall within what is known as a wagering policy, and would be void. Public policy forbids one person, who has no interest in the continuance of the life of another, from speculating on that life, by procuring a policy of insurance, but here it does not appear that Blue had any instrumentality whatever in procuring the policy on the life of

the charter in that case, devise the benefits of his policy to a stranger, so he might, in the first instance, take out a policy payable to a stranger.' It is only when the right of appointment of a beneficiary is unrestricted that the question of insurable interest can arise; when this is so, as the member is prima facie the insurer, and free to choose whom he pleases as the recipient of his bounty, he can designate whom he pleases.[28] But it seems clear, on principle and authority, that when the charter limits the beneficiaries to certain classes, the member has no power to designate some one not coming within those classes." [29] Again, under a federal decision, if the constitution of a mutual benefit society and policy provides that the beneficiary may be changed, at the will of assured, the fact that he has no pecuniary interest in the member does not invalidate the contract as against public policy.[30] If, however, the certificate

Bailey, or that he ever paid any portion of the premiums to procure the policy or to keep it in force, and hence the case of Insurance Co. v. Hogan, 80 Ill. 39, cited by defendant, has no bearing on this case. In the case cited, the insurance was procured by the beneficiary, and all the premiums were paid by him; while here Bailey procured the policy, and paid all the premiums. Manifestly the Hogan case can have no bearing on the facts of this case. Bailey had an insurable interest in his own life, and had a clear right to procure a policy on his life, and, unless some principle of public policy is violated, he could made it payable in case of death to any person whom he might desire": Id. 125, per Craig, J., citing Lemon v. Phœnix Mut. L. Ins. Co., 38 Conn. 394; Reeves v. Life Ins. Co., 27 N. Y. 282, per Wright, J.; Fairchild v. New England Mut. L. Ins. Assn., 51 Vt. 613; Langdon v. Union Mut. L. Ins. Co., 14 Fed. Rep. 272; Connecticut Mut. L. Ins. Co. v. Schaffer, 94 U. S. 457. In Rockhold v. Canton Mas. B. Soc., 129 Ill. 464, the 120 Ill. 121 case is noted, and in Canton Mas. Mut. B. Soc. v. Rockhold, 26 Ill. App. 155, the case is distinguished. Insurance of one's own life for the benefit of a stranger is not void as against public policy: Johnson v. Van Epps, 110 Ill. 551; 9 Ill. App. 412.

[28] Citing Freeman v. Benefit Soc., 42 Hun (N. Y.), 252; Olmstead v. Keyes, 85 N. Y. 593.

[29] Masonic Mut. Aid Assn. v. Bunch, 109 Mo. 560; citing Knights of Honor v. Nairn, 60 Mich. 44; Legion of Honor v. Perry, 140 Mass. 580; Daniels v. Pratt, 143 Mass. 216; Duvall v. Goodson, 79 Ky. 224; Aid Assn. v. Gonser, 43 Ohio St. 1; State v. Relief Assn., 29 Ohio St. 399. See Whitmore v. Supreme L. K. of H., 100 Mo. 36.

[30] Ingersoll v. Knights of Golden Rule (U. S. C. C. 1891), 47 Fed. Rep. 272.

is procured by one upon the life of another, he must have such an interest as will take it out of the category of gaming policies or wagers.[31] It appears from the Michigan cases,[32] that the courts there hold that a beneficiary must have an insurable interest on the ground of public policy, so in Kentucky it is declared that a mere friend has not an insurable interest, even though he is voluntarily made a beneficiary.[32a] So it is held in Massachusetts that the mere fact that the designation is invalid as to the person named as beneficiary, does not destroy the contract, and as to the question of insurable interest the court, per Allen, J., says: "It is, however, further contended that Margaret" (the daughter in law of insured, who was not within the class of persons who might be beneficiaries) "had no insurable interest in the life of John Shea; that all the premiums were paid by her, and that the contract is void as a wagering contract. This ground of defense is not open, not being set up in the answer.[33] But apart from that, the facts stated were far from showing conclusively that a mere wager was intended, and the presiding justice rightly refused so to rule. The relationship in which Margaret stood to John, and the matters disclosed in her testimony, tended strongly to show that the policy or certificate of membership was obtained in good faith, and not for the mere purpose of speculating on the hazard of a

[31] Whitmore v. Supreme L. K. of H., 100 Mo. 36, 46, 47.

[32] Cited under preceding notes in this section.

[32a] Candell v. Woodward, 96 Ky. 646; 29 S. W. Rep. 614. The policy here was taken out in a benevolent organization, and payments were to be made to "his or her family, or to be disposed of as he or she may direct," referring to members. That a friend has an insurable interest, see Berkeley v. Harper (D. C. App.), 22 Wash. L. Rep. 329. Where the designation was required to be of a person who was a member, a blood relative, or dependent, it was held that a "foster mother" could not take: Gibbs v. Anderson (Ky. 1894), 16 Ky. Law Rep. 397 (abstract of case). The company may by its admissions on the trial, and by confirming, under a stipulation, its defense to a particular question, concede the insurable interest of plaintiff: People's Mut. B. Soc. v. McKay (Ind. 1895), 39 N. E. Rep. 231. The clause prohibiting life insurance in favor of person having no interest in assured's life, contained in Rev. Stat. Mo. 1889, secs. 5860, 5886, is confined to assessment companies: New York L. Ins. Co. v. Rosenheim, 56 Mo. App. 27.

[33] Citing Forbes v. American Ins. Co., 15 Gray (Mass.), 249.

life in which she had no interest, and if so, the contract was valid if made with him, though made for her benefit, and though the premiums were paid by her."[34] Again, it is held in a recent case in the United States circuit court of appeals that where an accident insurance is obtained by one on his own life for his own benefit, he has the right to designate to whom it shall be payable in case of his death, and the company having by reason of such designation, agreed to pay the beneficiary, the latter need not allege or prove an insurable interest in the assured.[35] It is apparent, therefore, from the above cases that if the class for whose benefit the certificate is issued, or from which the beneficiary must be chosen, is not prescribed or restricted by the society, then much the same principles, except as to vested interest of the beneficiary, control the designation of the beneficiary, payee, or assignee as govern in ordinary life

[34] Shea v. Massachusetts B. Assn., 160 Mass. 289, 291; 35 N. E. Rep. 855; citing Campbell v. New England Ins. Co., 98 Mass. 381; Loomis v. Eagle Ins. Co., 6 Gray (Mass.), 396; Forbes v. American Ins. Co., 15 Gray (Mass.), 249; Cunningham v. Smith, 70 Pa. St. 450; Connecticut Ins. Co. v. Schaefer, 94 U. S. 457; Ætna Ins. Co. v. France, 94 U. S. 561; Mutual Ins. Co. v. Allen, 138 Mass. 24. That invalid designation does not void the whole contract, but that assured's executor may recover, see, also, Clarke v. Schwarzenberg, 162 Mass. 98; 38 N. E. Rep. 17.

[35] American Employers' Liability Assn. v. Barr, 16 U. S. C. C. A. 51, 56; 68 Fed. Rep. 873. See, also, Robinson v. United States Mut. Acc. Assn. C. C. E. D., Mo. 1895), 68 Fed. Rep. 825; Standard L. & A. Ins. Co. v. Catlin (Mich. 1895), 63 N. W. Rep. 897. As supporting the proposition in the text that if the member himself has made the contract with the association, and the charter, by-laws, constitution, or articles of association contain no provision requiring an insurable interest, or restricting the class from which the beneficiary must be chosen, then any person may be made a beneficiary, though having no insurable interest. See, also, Lamont v. Hotel Men's Mut. B. Assn., 30 Fed. Rep. 817; Milner v. Bowman, 119 Ind. 448; Lamont v. Grand Lodge I. L. H., 31 Fed. Rep. 177; Johnson v. Van Epps, 110 Ill. 551; Ingersoll v. Knights of Golden Rule, 47 Fed. Rep. 272; Glassey v. Metropolitan L. Ins. Co. (N. Y. S. C. 1895), 68 N. Y. St. Rep. 493; 32 N. Y. Supp. 353; Elkhart Mut. Aid Soc. v. Houghton, 103 Ind. 294; 2 N. E. Rep. 763; Mitchell v. Grand Lodge, 70 Iowa, 360; Martin v. Stubbings, 126 Ill. 403, et seq. Examine notes 58 Am. Rep. 852; 52 Am. Rep. 143; 27 Am. Rep. 327. But see Bayse v. Adams, 81 Ky. 368; distinguished in Schillinger v. Boes, 85 Ky. 363.

policies.[36] It is also held in cases of the character above considered where the policy or certificate is taken out by the member, that the fact that the beneficiary has no pecuniary interest in the life insured will not render the contract void as against public policy.[37] But, on the other hand, the transaction must not be merely a case of speculative insurance, or intended as a wagering contract. In a case in Texas[38] it was held that a person named as beneficiary under a regular life policy would, if he had no insurable interest in the insured's life, be treated as an assignee or trustee to receive the amount payable upon the policy for the benefit of those who were legally entitled to the same.[39] It is also held in that state that the heirs of the assured are entitled to the insurance money, under a regular life policy, in preference to a beneficiary who has no insurable interest;[40] and those who are entitled by the charter or by-laws of the society to be named as beneficiaries, may recover on a mutual benefit certificate, where they are so named, without otherwise showing that they have an insurable interest in the life insured.[41] Again, in New Jersey the tendency of judicial opinion seems to favor the proposition that the assured need not have an interest in the life insured, in order to support the contract of insurance.[42]

[36] See chapters on insurable interest, herein, and secs. 914, 919. See Martin v. Stubbings, 126 Ill. 403, per Bailey, J.

[37] Ingersoll v. Knights of Golden Rule (U. S. C. C. 1891), 47 Fed. Rep. 272; Martin v. Stubbings, 126 Ill. 406, 9 Am. St. Rep. 620, per Bailey, J.; Bloomington Mut. B. Assn. v. Blue, 120 Ill. 121.

[38] Equitable L. Assur. Soc. v. Hazlewood, 75 Tex. 338; 19 Ins. L. J. 193; 7 L. R. Annot. 217.

[39] See, also, Mutual L. Ins. Co. v. Blodgett (Tex. C. A. 1894), 27 S. W. Rep. 286.

[40] Mayher v. Manhattan L. Ins. Co., 87 Tex. 169; 27 S. W. Rep. 124.

[41] Voorhéis v. People's Mut. B. Soc. of Elkhart, 91 Mich. 472, 473; 51 N. W. Rep. 1109.

[42] Vivar v. Supreme L. K. of P., 52 N. J. L. 455, 469, per Dixon, J.; 20 Atl. Rep. 36; citing Trenton Mut. L. Ins. Co. v. Johnson, 4 Zab. (N. J.) 576; Martin v. Franklin F. Ins. Co., 9 Vroom (38 N. J. L.), 140; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; May on Insurance, sec. 112. See Silvers v. Michigan Mut. B. Assn., 94 Mich. 39, where children of a deceased brother of the member took the fund, although they had no insurable interest.

§ 730. Interest of Beneficiary in Regular Life Policy is Vested—Cannot be Defeated Without Consent.—In an ordinary life insurance policy the weight of authority supports the rule that the interest of the beneficiary becomes vested when the policy in which he is named as beneficiary is issued and the contract completed, unless the right is expressly given or reserved to the insured to subsequently designate a new beneficiary. Consequently, if no such right is expressly given or reserved to him, the insured cannot defeat the rights of the first-named beneficiary by a subsequent appointment without the consent of the person first designated, and although the contract may be annulled by the company for sufficient cause, yet the disposal of the fund while the policy is in force is not within the control of assured.[43] If the insured takes out a regular life policy payable to her husband, a request for a change of beneficiary in favor of a friend, "provided my husband does not claim," does not operate to divest the husband's interest.[44] Where a life policy was made payable to R., C., and

[43] Wilmaser v. Continental L. Ins. Co., 66 Iowa, 417; Pilcher v. New York L. Ins. Co., 33 La. Ann. 322; National Ins. Co. v. Halsey, 78 Me. 268, 271, 272; Landrum v. Knowles, 22 N. J. Eq. 594; Manhattan Ins. Co. v. Smith Co., 44 Ohio St. 156; Washington Cent. Bank v. Hume, 128 U. S. 195; Waldron v. Waldron, 76 Ala. 285; Chapin v. Fellowes, 36 Conn. 132; 4 Am. Rep. 49; Lemon v. Phœnix Ins. Co., 38 Conn. 294; Glaiz v. Gloeckler, 104 Ill. 573; 44 Am. Rep. 94; Small v. Jose, 86 Me. 120; 29 Atl. Rep. 976; Holland v. Taylor, 111 Ind. 125; Bayse v. Adams, 81 Ky. 368; Pingree v. National L. Ins. Co., 144 Mass. 374; Alice v. Wawe, 28 Minn. 166; City Sav. Bank v. Whittle, 63 N. H. 587; Garner v. German L. Ins. Co., 110 N. Y. 266; Ferndon v. Canfield, 104 N. Y. 143; Hooker v. Sugg, 102 N. C. 115; 11 Am. St. Rep. 717; Connecticut Mut. L. Ins. Co. v. Baldwin, 15 R. I. 106; 23 Atl. Rep. 105; 14 Ins. L. J. 813. But see Estate of Brerton, 78 Wis. 33; Gambe v. Connecticut Mut. L. Ins. Co., 50 Mo. 44; Foster v. Gile, 50 Wis. 603; Robinson v. United States Mut. Acc. Assn. (U. S. C. C., E. D. Mo. 1895), 68 Fed. Rep. 825; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 595, per Elliott, J.; citing Hutson v. Merrifield, 51 Ind. 24; 19 Am. Rep. 722; Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285; Penn. M. L. Ins. Co. v. Wiler, 100 Ind. 50; 50 Am. Rep. 769; Chapin v. Fellowes, 36 Conn. 32; 4 Am. Rep. 49; 44 Am. Rep. 94.

[44] Helfrich v. John Hancock Mut. L. Ins. Co. (N. Y. C. P. 1894), 59 N. Y. St. Rep. 242; 28 N. Y. Supp. 535. A husband who insures his own life for the benefit of his wife cannot change the distribution of proceeds. An administrator or executor may collect funds, but holds

J., share and share alike, or their legal representatives, and before the death of the insured J. died, it was held that the interest of J. was a vested one, and went to his distributees upon his death.[45] A question has arisen as to whether the insured may, if he retains possession of the policy himself, subsequently substitute the name of another person who may be entitled to the proceeds of the policy, in place of the beneficiary first named.[46] In a case which arose in Connecticut[47] it was held that if the policy was delivered to another as a depositary for the beneficiary, then there was an executed gift of the policy to said beneficiary, and the assured might not substitute a new beneficiary. It was conceded, however, that so long as the assured retained the policy in his own possession, he might control it as his own, but that the delivery to the beneficiary vested in her a complete title.[48] And in a case which arose in New York[49] it was held that although a policy obtained by a person on his own life, payable on his death, expressly declares his insurance to be in trust for his children named therein, yet if he keeps the policy in his own possession, and pays the premiums, he may with the assent of the company surrender it, and accept a new policy payable to a different beneficiary. This decision was, however, reversed by the court of appeals, the court adhering to the rule of vested interest.[50] So the weight of authority clearly supports the rule that the beneficiary under an ordinary life policy has such a vested interest that the assured has no control of the disposal of the fund, except with the beneficiary's consent.

them in trust for the widow and children: Gould v. Emerson, 99 Mass. 154. See Mayher v. Manhattan L. Ins. Co., 87 Tex. 169; 27 S. W. Rep. 124; Equitable L. Assur. Assn. v. Hazlewood, 75 Tex. 338; 19 Ins. L. J. 193; 7 L. R. Annot. 217.

[45] McCaulay v. Central Nat. Bank, 27 S. C. 215. It was also held that the policy might be pledged as collateral security.

[46] See sec. 743, herein.

[47] Lemon v. Phœnix Ins. Co., 38 Conn. 301.

[48] See Ward v. Audland, 8 Beav. 201; Johnson v. Van Epps, 110 Ill. 558, per Mulkey, J.; Foster v. Gile, 50 Wis. 603.

[49] Garner v. Germania Ins. Co., 13 Daly (N. Y.), 255.

[50] Garner v. Germania Ins. Co., 110 N. Y. 266; distinguishing Whitehead v. New York L. Ins. Co., 102 N. Y. 143.

§ 731. Vested Interest Defeated by Contract.—Although the interest of the beneficiary in a life policy is a vested one, nevertheless the insured may enter into such arrangements with the insurer as may be agreed on, either as to the persons who are to receive the benefit of the policy, or as to what control over it the insured is to exercise. In this respect an insurance policy does not differ from any other contract, and is subject to the same general rules of interpretation, and the insured may reserve his right to change the designation of the beneficiary in whole or in part. In such case no indefeasible interest is vested in the named beneficiary nor settlement made upon him which cannot be revoked, and such reservation may be expressed in the policy itself or some instrument properly made a part thereof.[51]

§ 732. Statements as to Beneficiary in Application.—There may be a provision in the charter or by-laws of a mutual benefit society or in the statute of its incorporation, that the certificate shall be payable to the person designated in the application for membership. In such a case, in the absence of any provision giving the member the right to change the beneficiary, the rights of a person or persons designated become vested, or the fund must be disposed of as provided by the charter or by-laws or statute.[52] The provision may, however, reserve to the member the right to change the beneficiary. Thus, in a case which arose in Texas[53] the by-law provided that "applicants shall enter upon their application the name or names of the members of their family dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate . . . . subject to such future disposal among their dependents as they themselves direct." It was held in this case that the rights of the beneficiary were not vested, but that the insured member might at any time desig-

[51] Splawn v. Chew, 60 Tex. 532, 534, per Willie, C. J. See sec. 742, herein.

[52] Presbyterian Fund v. Allen, 106 Ind. 593, 596, 597; Addison v. New England Com. Trav. Assn., 144 Mass. 591; 12 N. E. Rep. 407; Thomas v. Larke, 67 Tex. 469; Whitehurst v. Whitehurst, 83 Va. 153; Detrich v. Madison Rel. Assn., 45 Wis. 79.

[53] Splawn v. Chew, 60 Tex. 532.

nate a new beneficiary. In another case, the charter of the association provided that "the fund to which his family is entitled shall be paid as may be designated in the application for membership. This being changed by death, or otherwise impossible, it shall go first to the widow and infant children," and afterward in the order named. In his application for membership he directed that the fund should be paid as he might by will direct. He, however, died intestate, but left a widow, to whom it was held the fund belonged in preference to the distributees, under the statute of descent and distribution.[54] Though the constitution of a benefit association may provide that the object of the society is to secure the payment of benefits to certain classes, yet it has been held that if the member in his application designates some person not within those classes, the acceptance of the application by the society will operate as a contract to pay the amount of the certificate to the person designated in the application, subject to the member's rights, of course, to change the beneficiary. So where there was a provision in the constitution of a relief association that "this association shall have for its object the payment to the family of the deceased member of so many dollars as there are members of the association," the assessment to be "paid to his legal representative or to such person as he may have designated or appointed in writing, ... provided always that when such member shall leave a widow or children he shall have no power to deprive her or them of the benefits specified in this article, by will or otherwise, but the same shall be paid to her or them absolutely," and the member designated a niece in his application, it was held that on his death the fund was payable to her, though a daughter survived him.[55] In a case which arose in Massachusetts,[56] where it appeared that the constitution of the society provided for payment of benefits to "the widows and orphans," it was held that a member might in his application

[54] Whitehurst v. Whitehurst, 83 Va. 153.

[55] Foliner's Appeal, 87 Pa. St. 133. See Gibson v. Kentucky Grangers' Mut. B. Soc. (1886), 8 Ky. Law Rep. 520.

[56] Massachusetts C. O. of F. v. Callahan, 146 Mass. 391.

designate his mother as beneficiary, and she would be entitled to recover. This decision, however, rested upon the statute which permitted such organization to assist the widows and orphans "or other relative of deceased members." [57] Again, in a Minnesota case the by-laws provided that every applicant for membership should designate in his application the person or persons to whom, in the event of his death, the benefit should be paid; it also provided for a change of beneficiaries, and a verbal designation being made, it was held that the by-law requiring that the designation be made in the application was a mere formality, which might be waived, and that if it was, and somebody else was accepted, it was a sufficient designation, and others claiming under the policy as "heirs" could not object.[58] If the application for a policy of life insurance is made a part of the contract, and in that application the insured, in reply to the question for whose benefit is the insurance made, has written "myself," the proceeds will be payable to his estate, in preference to the "executors or administrators" of said member in trust, to be paid over to his heirs at law as designated in the policy,[59] although the member states in his application that the policy is for the benefit of his estate, and the policy is payable, by the terms thereof, to the "legal representatives" of the member, nevertheless his immediate family will take the benefit where the by-laws state the objects of the society to be to "promote the welfare of all its members, and to furnish substantial aid to their families. It also appeared in this case that in the application, in answer to a requirement to state the name of the beneficiary, the answer was "my estate." [60]

§ 733. When Member may Designate Beneficiary by Will.—As we have seen, the rules of a mutual benefit society generally prescribe the manner in which the member

[57] Stat. 1882, c. 195, sec. 2; enlarging c. 115, sec. 8, of Mass. Pub. Stat.

[58] Hanson v. Minnesota Scan. Rel. Soc., 59 Minn. 123; 60 N. W. Rep. 1091.

[59] Harding v. Littlehale, 150 Mass. 100; 22 N. E. Rep. 703.

[60] Sulz v. Mutual Res. Fund L. Assn., 145 N. Y. 563; 58 N. Y. St. Rep. 563; 28 N. Y. Supp. 263; Bishop v. Grand Lodge, 112 N. Y. 627, distinguished.

shall designate his beneficiary. In all cases the rules and laws of the society must be examined to determine whether a designation of a beneficiary is valid. Consequently, the right of a member to designate and change his beneficiary by will must in each case depend upon said rules, regulations, etc. Thus, where a by-law of a mutual benefit association prohibited a change of beneficiary without the approval of its directors, and the charter provided for payment among others "to assigns or legatees," it was held that the by-law was contrary to the provisions of the charter, and that the appointment of a new beneficiary by will was valid.[61] In another case the certificate of an incorporated benevolent order provided that, under the laws thereof, "two thousand dollars should be paid" as a benefit, upon due notice of assured's death to such person or persons as he might, "by will or entry on the record-book of this lodge or on the face of this certificate, direct." And it was held that his share in the fund passed under the residuary clause of his will disposing of "the balance of all my property of every kind." [62] And it has also been held to pass under the words "all other property of which I shall die possessed." [63] Where the rules of a regularly incorporated mutual benefit association provided that on the death of a member his share of the beneficiary fund should be paid to the persons named by him on the will-book, and that if he named no one it should be divided equally among his family, and the rules did not assume to take away the right to change the disposition of the fund, it was held that where a member made a will after entering an order on the will-book, the will should be followed.[64] So if the fund under a mutual benefit certificate is payable to the estate of a member or to himself, he may dispose of the same by will.[65] A bequest by a wife's will of all her property to her husband, for his own during his life, and afterward to her daughter, and another bequest by the husband

[61] Raub v. Masonic Mut. Rel. Assn., 3 Mackey (D. C.), 68.

[62] Weil v. Trafford, 3 Tenn. Ch. 108.

[63] Aveling v. Northwestern Mas. Aid Assn., 72 Mich. 7; 1 L. R. Annot. 528. See Duvall v. Goodson, 79 Ky. 224.

[64] Catholic B. Assn. v. Priest, 46 Mich. 429.

[65] Hamilton v. McQuillan, 82 Me. 204; 19 Atl. Rep. 167; Catholic K. of America v. Kuhm, 91 Tenn. 214; 18 S. W. Rep. 385.

that the proceeds of a benefit certificate upon his life, payable to his wife, shall go to his daughter, will entitle her to the proceeds of the certificate.[66] If a person in his application provides that the fund shall be payable as he may direct by his will, he may in his will designate any person as beneficiary who is entitled, under the laws of the society, to receive the proceeds of the certificate.[67] Again, if the charter provides that the fund shall be payable as designated in the application, and this, "being changed by death or otherwise impossible, it shall go first to the widow and infant children," and then to certain others, and the fund is directed in the application to be paid as designated by will, and no will or infant child is left, but a widow survives, she is entitled to recover.[68]

§ **734. Disposition by Residuary Clause of Widow's Will—Statute.**—A married woman dying before her husband without children, may, under a statute in New York, dispose of a policy on her husband's life by a residuary clause in her will, and a transfer by her executors is valid without the husband's written consent.[69] So the residuary clause of the widow's will passes the fund, where the policy is payable to her, or if not alive at the time of the insured's death, then to her children, and if she dies childless, her husband surviving, in such case the money is subject to the control and disposition of the executors.[70]

§ **735. When Member may not Designate Beneficiary by Will—Effect of Designation by Will.**—If the laws of the society prescribe a certain way in which the beneficiary shall be designated or changed, and do not include the right to change the direction by will, the member is bound by such laws

[66] Brew v. Clement, 48 Kan. 386; 29 Pac. Rep. 704; 21 Ins. L. J. 513.

[67] See sec. 728, herein.

[68] Whitehurst v. Whitehurst, 83 Va. 153.

[69] Harvey v. Van Cott, 71 Hun (N. Y.), 394; 55 N. Y. St. Rep. 32; 25 N. Y. Supp. 25, under Laws N. Y. 1873, c. 821; Laws N. Y. 1879, c. 248.

[70] Harvey v. Van Cott, 71 Hun (N. Y.), 394; 55 N. Y. St. Rep. 32; 25 N. Y. Supp. 25; Laws 1873, c. 821, and Laws 1879, c. 248, considered.

and cannot designate a beneficiary by will.[71] Thus, where the rules and laws of the society provide that the change of beneficiary can only be effected by a surrender of the policy, the insured cannot effect a change by will.[72] Nor can he change the beneficiary by will where the laws of the society provide that the change shall be made by a direction in writing on the back of the certificate in a prescribed form, and attested by certain officers of the society;[73] and where they provide that the change shall be made during the lifetime of the member and be approved by the directors, they must be complied with.[74] Again, in a case where under the by-laws of a mutual benefit association, providing that any member may change the name or names of the beneficiaries (in his certificate of membership), upon application in writing to the secretary, whereupon the secretary shall change upon the record the name of such beneficiary, it was held that the change could not be effected by the will of a member, but only in the manner provided in the by-laws.[75] If a corporation has the right to specify the classes of beneficiaries, the member is limited to that class, and may not substitute a beneficiary outside thereof, and may not bequeath it to executors or creditors contrary to the rules, regulations, and by-laws, and where the by-law makes the fund payable to the wife, unless otherwise ordered after the date of marriage, and the fund is not to be willed or transferred to any other than those specified, the widow is entitled.[76] In a case which arose in Canada[77] it appeared that a person had procured two certificates of different date in a benefit society. The first one was payable to his wife, if she survived him; if not, to their children. The second was payable to the wife and children. He subsequently made a will bequeathing half of all policies on his life to his wife during her life and widowhood, and upon her death to go to the children. In an action upon the certifi-

[71] Holland v. Taylor, 111 Ind. 121; 12 N. E. Rep. 116.

[72] Holland v. Taylor, 111 Ind. 121; 12 N. E. Rep. 116.

[73] Haines v. Iowa L. of H., 78 Iowa, 245; 43 N. W. Rep. 185.

[74] Hainer v. Iowa L. of H., 78 Iowa, 245; 43 N. W. Rep. 185.

[75] Stevenson v. Stevenson, 64 Iowa, 534.

[76] Morgan v. Hunt (Ont. H. C. J. C. P. D. 1895), 15 Can. L. T. 224.

[77] In re Cameron-Mason v. Cameron, 21 Ont. Rep. 634; 12 Can. L. T. 171.

cates it was held that under the laws[78] relative to insurance for the benefit of the wife and children, the wife was entitled to one-half of the first certificate for life and to the other half absolutely; as to the second certificate, that she was held entitled to one-half during her life and widowhood. An attempt by one insured to change the beneficiary named in the policy by an instrument purporting to be a will, but which has no witnesses, is ineffectual for that purpose.[79] If no particular beneficiary is designated, and a life policy provides that it shall be subject to the will of assured, and the latter by his will bequeathes his entire estate to a particular person, subject to the payment of his debts, the executor of the insured is entitled to the insurance money, and may sue therefor in his own name, without joining the legatee.[80] Again, if the rules of a society provide that the proceeds of a benefit certificate shall be paid to the person designated in writing as beneficiary, the member may by will designate the person who shall be entitled to the fund.[81] A daughter named as beneficiary with her mother and sister may take her mother's share as legatee under the latter's will.[82]

§ 736. Right of Insured Under Regular Life Policy to Dispose of Same by Will.—If a person insured under a regular life policy has designated the person to whom the proceeds shall be payable, and has reserved no power of revocation, he cannot by will divert the funds from the person designated.[83] Thus, where one insured his life and designated his wife as beneficiary, and the policy provided "that in case of the decease of the wife during the lifetime of the assured the said assured may, at his option, substitute any other beneficiary," it

[78] Rev. Stat. Ont. 1887, c. 136, sec. 6, as amended by 51 Vict., c. 22, sec. 3, and 53 Vict., c. 39, sec. 6, act entitled "Act to secure to wives and children the benefit of life insurance."

[79] Wendt v. Iowa L. of H., 72 Iowa, 682; 34 N. W .Rep. 470.

[80] Winterhalter v. Workmen's Guaranty Fund Assn., 75 Cal. 245.

[81] Order Mutual Companions v. Griest, 76 Cal. 494; 18 Pac. Rep. 652.

[82] Small v. Jose, 86 Me. 120; 29 Atl. Rep. 976.

[83] Wilmaser v. Continental L. Ins. Co., 66 Iowa, 417; 55 Am. Rep. 277; McClure v. Johnson, 56 Iowa, 620; Weisert v. Muehl, 81 Ky. 336; Gould v. Emerson, 99 Mass. 154; 96 Am. Dec. 720.

was held that the power thus conferred on the assured was not executed by a bequest in his will made a year after the wife's death, in which he attempted to give and bequeath the policy in question with three others, none of which were a part of his personal estate.[84] It was also decided that the power should be exercised within a reasonable time, and that it was not a reasonable time after the payment of the next premium after the death of the wife. If, however, no beneficiary is designated, and the policy is payable to the assured, his executor, and assigns, he may dispose of the same by will. If a policy is payable as the insured may by his will direct, he may by will give all his estate to a particular person, subject to the payment of his debts, and the fund goes to the executor, and he may sue therefor in his own name, without joining the legatee.[85] Where, however, a member of a benevolent association, who had the right to designate the person to whom the benefit should be paid, gave the requisite direction, and also made a will in which he gave the benefit to the same person, it was held that the executor could not maintain an action for it, but that the fund was payable directly to the donee.[86]

§ 737. Who May be Beneficiary—Order of Knights of Pythias.—Under the Endowment Rank of the Order of the Knights of Pythias a member may designate a person as beneficiary, even though that person is not a relative of the member. This was so held in Vivar v. Supreme Lodge Knights of Pythias.[87] In this case the court, per Dixon, J., says: "In the present case the inquiry related merely to the payee of the money for which the insurer was to become responsible, and by the very terms of the contract subsequently made the insurer expressly left the designation of the payee to the absolute discretion of the insured, the language of the certificate being that the supreme lodge will pay the sum insured to 'Emily Louisa Vivar, his wife, as directed by said brother (Vivar) in his appli-

[84] Eiseman v. Judah, 1 Flip. (C. C.) 627; 4 Cent. L. J. 345, and note.

[85] Winterhalter v. Workman's Guaranty Fund Assn., 75 Cal. 245.

[86] Bown v. Supreme Council Cath. B. Mut. Ben. Assn., 33 Hun (N. Y.), 263.

[87] 52 N. J. L. 455; 20 Atl. Rep. 36.

cation, or to such other person or persons as he may subsequently direct, by will or otherwise.' A similar power is given to the insured by article 9 of the constitution of the rank. It seems manifest that a subject thus committed to the control of the insured was not material to the contract of the insurer, nor so regarded by the insurer, and that if Vivar had declared Emily Louisa Vivar to be not related to him, as the lodge now alleges the truth to have been, the contract would have been made on precisely the same terms as at present. While, therefore, the fact that the question as put might justify an inference that relationship between the payee and the member was thought material, yet the express terms of the certificates and the provisions of the constitution force the conclusion that it was not. In this respect the Endowment Rank of the Knights of Pythias differs from those benevolent societies which are organized for the benefit of members and their families solely, and with regard to which it has been properly held that the relationship of the payee is material." [88] A Knights of Honor beneficiary has no present interest either in the certificate or fund during the member's life.[89]

§ 738. Designation of Beneficiary—How Construed—Analogous to Testamentary Disposition.—In the construction of the language used in designating the beneficiary under a benefit certificate, courts have, in general, applied principles of law analogous to those applicable in the construction of wills.[90] And it is expressly held in North Carolina that the rules for interpreting the will of a testator will guide, so far as applicable, in ascertaining the legal effect of a clause in a life policy designating the beneficiaries. The difference in the cases consists in the fact that the interest vests under a life

[88] Id., 468, 469.

[89] Lorscher v. Supreme Lodge K. of H., 72 Mich. 316; 40 N. W. Rep. 545

[90] Duvall v. Goodson, 79 Ky. 224; Union Mut. Aid Assn. v. Montgomery, 70 Mich. 587; 38 N. W. Rep. 588; National Am. Assn. v. Kirgin, 28 Mo. App. 80; Thomas v. Leak, 67 Tex. 469, 471; Silvers v. Michigan Mut. B. Assn., 94 Mich. 39; Union Mut. Assn. v. Montgomery, 70 Mich. 587; 14 Am. St. Rep. 519; 38 N. W. Rep. 588; Chartrand v. Brace, 16 Colo. 19.

policy at once upon its issue, but does not vest under a will until the testator's death.[91] So in Missouri, it is declared that the right to change a beneficiary under a certificate in a benevolent society or fraternal organization has generally been held analogous to a testamentary disposition of the benefit, revocable like a will at any time during assured's lifetime.[92] The courts should endeavor to ascertain the intention as to the direction of the payment of the fund, and by applying the principles applicable in the construction of wills as analogous in such cases, the intention may be better arrived at. Necessarily, however, the whole contract must be considered, and, as stated elsewhere, and fully recognized as settled law, this includes the certificate, the charter, by-laws, constitution, and articles of association, of which the member is presumed to have knowledge.[93]

§ 739. Where no Beneficiary is Designated—Lapse to Society.—There are many decisions in which it has been held that if no beneficiary is designated, the company or society will be liable to no one. These cases, of course, rest on the peculiar wording of the charter and by-laws of the society, or of the certificate. Thus, where the laws of the society provided for the payment of a certain sum to such person or persons as the member "may, by entry in the record-book of the association and on the face of this certificate, direct the same to be paid," it was held that the contract with the society was that the fund should be paid only to such person or persons as the member might direct on the record-book of the association, and, therefore, when no designation was made in this manner, the company was not liable to any one.[94]

[91] Hooker v. Sugg, 102 N. C. 115; 11 Am. St. Rep. 717.

[92] Masonic B. Assn. v. Bunch, 109 Mo. 580, per Gantt, P. J., citing Union Assn. v. Montgomery, 70 Mich. 587; 38 N. W. Rep. 588; Chartrand v. Brace, 16 Colo. 19; 26 Pac. Rep. 152; Duvall v. Goodson, 79 Ky. 224; Thomas v. Leake, 67 Tex. 469; American Assn. v. Kirgin, 28 Mo. App. 80.

[93] See Eastman v. Association, 62 N. H. 555, 556, per Smith, J.; 20 Cent. L. J. 580.

[94] Eastman v. Prov. Mut. Rel. Assn., 62 N. H. 555; 20 Cent. L. J. 580. See, also, Morely v. Northwestern Mas. Aid Assn., 10 Fed. Rep. 237.

Again, the by-laws of an association are controlled by the statutes under which it was organized. So where a society was formed under an Illinois statute, providing for the organization of associations "intended to benefit the widow, orphans, heirs, and devisees of deceased members," it was held that a by-law, passed by the association which provided that in case a member died without leaving any widow, children, or parents, the endowment should go to the reserve fund, unless such member had designated a beneficiary, was invalid. In such a case, if the member dies without having designated a beneficiary, his heirs will be entitled to the fund.[95] In another case, where A was a member of a benevolent association which paid upon the death of a member a sum of money to his wife or to his children, or, if he left neither wife nor children, then to such a person as he should have formally designated to his said lodge prior to his decease, and A, who had neither wife nor children, formally designated his mother, who died before his death, and by his will he had designated his brother as the person who was to receive the benefit, it was held that this was not such a designation as was contemplated, and that the benefit lapsed to the society.[96] Again, where the constitution provided that the designation of the beneficiary should be in writing, it was held that if the insured failed to designate any person, the fund would lapse to the society.[97] Generally, however, the laws of the society specify certain classes to whom the fund shall be payable, and in such a case, as a rule, the fund should go to those classes where the member has failed to designate any particular beneficiary. The cases which we have noted in this section turn upon the peculiar provisions of the charter or by-laws as to the manner of designation of the beneficiary, and ought not to be held to establish any rule of value

[95] Wolf v. District Grand Lodge, 102 Mich. 23; 60 N. W. Rep. 445.

[96] Hellenburg v. District No. 1 I. O. of B'nai Berith, 94 N. Y. 580.

[97] Order of Mutual Companions v. Griest, 76 Cal. 494. Contra, see Bishop v. Grand Lodge Empire Order of Mut. Aid, 112 N. Y. 627, reversing 43 Hun (N. Y.), 472. This last case distinguishes Hellenberg v. Dist. No. 1, I. O. B. B., 94 N. Y. 580; Greeno v. Greeno, 23 Hun (N. Y.), 478; Arthur v. Odd Fellows, 29 Ohio, 557; Catholic M. B. Assn. v. Priest, 46 Mich. 429; Renk v. Herman Lodge, 2 Dem. (N. Y.) 409.

outside of cases of like character. If the constitution of the order provides that the benefit shall be paid to certain relatives and "dependents," in case of death of all the beneficiaries before that of the member, and, in case there are no relatives within the enumerated classes, that the fund shall revert to the association, there being no other disposition thereof, and the member revokes his designation without making another, the relatives enumerated will take.[98]

§ 740. When Insured in Regular Life Policy May Change Beneficiary.—An insured may change the beneficiary if the policy so provides. Thus, where the policy provided that "this policy is issued and accepted upon the express condition that the said" member "may, with the consent of the company, at any time assign it, or before assignment change the beneficiary therein, or make any other change," and both the charter of the company and the general statute provided that insurance effected for the benefit of the wife and children should inure to their benefit, and be paid to the beneficiaries named in the policy, free from the demand of the creditors of the insured, it was held, in an action to restrain the husband from disposing of the policy, that neither the charter nor statute conflicted with the provision in the policy reserving to him the right to change the beneficiary.[99] In some states there are statutes in existence which permit members of certain assurance associations to designate a new beneficiary with the consent of the company and without the consent of the former beneficiary.[99a]

[98] Cullin v. Supreme Tent K. of M. of the W., 77 Hun (N. Y.), 6; 59 N. Y. St. Rep. 251; 28 N. Y. Supp. 276.

[99] Hopkins v. Hopkins, 92 Ky. 324; 17 S. W. Rep. 864. See, also, Greeno v. Greeno, 23 Hun (N. Y.), 482. In this last case the court said: "If, however, by the terms of the policy any power of disposition over the money payable at his death is reserved to the insured, such power is in the nature of an appointment, and must be executed as such; and the by-laws in this case reserved the power, no policy having been issued": Id., 482, per Runsey, J.

[99a] Iowa, 1 McClain's Annot. Code 1888, sec. 1767; Laws 1886, c. 65, sec. 7; 1 Kan. Annot. Gen. Stat. 1889, sec. 3464 (by assignment a bequest may change provided the new beneficiary has an insurable interest); Mich. Pub. Acts 1887, No. 187, sec. 16 (may change with

§ 741. Right to Change Beneficiary Under Mutual Benefit Certificate—Whether Interest of Beneficiary a Vested Interest.—In those cases where the certificate or the constitution, charter, or by-laws of a mutual benefit society reserves to the insured the right to change the beneficiary named in the certificate, the courts are in harmony in their decisions. Clearly, in such a case the beneficiary acquires no vested rights. His interest is merely a contingent one or expectancy, liable to be divested at any time by a subsequent appointment by the insured of another person, who will be entitled to the benefits of the certificate.[100] And it may be stated as a general rule well settled, that, in the absence of any provision in the contract to the contrary, the beneficiary in associations or orders of the kind under consideration has no vested interest, or any property in the certificate, other than that of the character above stated, until the death of the member or insured.[101] So it is said in a recent federal case that it is

consent of company and of beneficiary if he be a creditor); N. Y. 3 Banks & Bros. Rev. Stat., 8th ed., p. 1709, sec. 18 (corporation shall give right to change without requiring the consent of the beneficiary).

[100] See Ingersoll v. Knights of Golden Rule (U. S. C. C. 1891), 47 Fed. Rep. 272; Lamont v. Grand Lodge, 31 Fed. Rep. 177; Nally v. Nally, 74 Ga. 669; Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 626; Bagley v. Grand Lodge, 131 Ill. 498; 22 N. E. Rep. 487; Milner v. Bowman, 119 Ind. 448; 21 N. E. Rep. 1094; Holland v. Taylor, 111 Ind. 121; Union Mut. Aid Assn. v. Montgomery, 70 Mich. 587; 14 Am. St. Rep. 519; 38 N. W. Rep. 588; Knights of Honor v. Watson, 64 N. H. 517, and cases cited in next note.

[101] Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584; 52 N. W. Rep. 1012; Supreme Conclave Royal Adelphia v. Cappella (U. S. C. C. E. D., Mich. 1890), 41 Fed. Rep. 1, 3, per Brown, J., citing numerous cases; West v. Grand Lodge A. O. U. W., 22 Or. 277, per Lord, J.; 29 Pac. Rep. 610; Benton v. Brotherhood R. R. Brakemen, 146 Ill. 570; 34 N. E. Rep. 939; Chartrand v. Brace, 16 Colo. 19; Block v. Valley Mut. Ins. Co., 52 Ark. 201; 20 Am. St. Rep. 166; Masonic Ben. Assn. v. Bunch, 109 Mo. 579, per Gantt, P. J., citing Fisk v. Aid Union (Pa.), 11 Atl. Rep. 84; Beatty's Appeal, 122 Pa. St. 428; 15 Atl. Rep. 861; Byrne v. Casey, 70 Tex. 247; Brown v. Grand Lodge, 80 Iowa, 287; Hirschl v. Clark, 47 N. W. Rep. 78; Barton v. Relief Assn., 63 N. H. 535; Supreme Council v. Franke, 137 Ill. 118; 27 N. E. Rep. 86; Supreme Council v. Morrison, 16 R. I. 468; 17 Atl. Rep. 57. See, also, Barton v. Prov. R. Assn., 63 N. H. 535; Bachman v. Supreme Lodge K. and L. of H., 44 Ill. App. 188; 23 Chi. L. News,

"well settled that the first-named beneficiaries have no vested or permanent interest in the policy, such as cannot be disturbed by the assured with the consent of the company"; the case being one of a policy in a mutual accident association, and effected by assured upon his own life, he paying all the pre-

264; Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 626; Bloomington M. L. B. Assn. v. Blue, 120 Ill. 121; Masonic Mut. Soc. v. Burkhardt, 110 Ind. 189; 11 N. E. Rep. 449; Brown v. Grand Lodge Iowa A. O. U. W., 80 Iowa, 287; 45 N. W. Rep. 884; Mitchell v. Grand Lodge K. of H., 70 Iowa, 360; Duvall v. Goodson, 79 Ky. 224, 229; Tyler v. O. F. N. R. Assn., 145 Mass. 134; Richmond v. Johnson, 28 Minn. 448; Hellenberg v. District No. 1 of I. O. of B. B., 94 N. Y. 580, 585, per Finch. J.; Nix v. Donovan, 46 N. Y. St. Rep. 21; 18 N. Y. Supp. 435; Massey v. Mutual R. Assn., 102 N. Y. 523, 529, per Rapallo, J.; Sabin v. Grand Lodge A. O. U. W., 28 N. Y. St. Rep. 45; Durian v. Central Verein etc., 7 Daly (N. Y.), 170; Deady v. Bank Clerks' Mut. B. Assn., 17 Jones & S. (49 N. Y. Super. Ct.) 249; Maneely v. Knights of Bir., 115 Pa. St. 305; Splawn v. Chew, 60 Tex. 532; Hirschl v. Clark, 81 Iowa, 200; 47 N. W. Rep. 78. In Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 595, 596, the court, per Elliott, J., speaking of the principle that in life policies the beneficiary's interest is vested, then says: "There is, however, much diversity of opinion upon the question as to the applicability of this principle to policies like the one before us, issued by associations of the class to which appellant belongs"; citing McClure v. Johnson, 56 Iowa, 620; Tennessee Lodge v. Ladd, 5 Lea (Tenn.), 716; Durian v. Central Verein, 7 Daly (N. Y.), 168; Richmond v. Johnson, 28 Minn. 447; 11 Ins. L. J. 215; Swift v. R. P. & T. C. B. Assn., 96 Ill. 309; Ballou v. Gile, 50 Wis. 614; Kentucky Mas. Mut. L. Ins. Co. v. Miller, 13 Bush (Ky.), 489; Catholic B. Assn. v. Priest, 46 Mich. 429; Expressmen's Aid Soc. v. Lewis, 9 Mo. App. 412; Maryland M. B. Soc. v. Clendinen, 44 Md. 429; 22 Am. Rep. 52, and the court adds: "The weight of authority, as will appear from an examination of the cases cited, is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts." This is cited with approval and relied on in Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500, 504, per Hoyt, C. J. See cases cited in preceding note. The insured has no power to designate beneficiaries by will other than his wife and children where the statute gives the wife and children the benefit of life insurance: In re Grant, 26 Ont. R. 120, 485; 15 Can. L. T. 102; Rev. Stat. Ont., c. 136; amended, 51 Vict., c. 22, sec. 3; 53 Vict. c. 39, sec. 6. As to changing beneficiary, see note to 14 Am. St. Rep. 327.

miums.[102] The right, however, of a member to change his beneficiary arises not from the character of the association, but from the contract between the parties.[103] And it has been held that the interest of the beneficiary may be defeated by a subsequent appointment, though he may have paid the assessments.[104] If a benefit certificate payable to the wife of the member provides that the member may change the beneficiary at will, without notice to or consent from the beneficiary, the wife cannot, where a new beneficiary is subsequently named, recover the premiums paid by her husband, since they are not made specifically for her use, nor can she recover damages on the ground that she has been deprived of an expectancy, as there is no rule for the estimation of damages in such a case.[105] Where a son, who had procured such a certificate payable to his mother, surrendered it without his mother's consent, and procured another payable to his wife, which he also subsequently surrendered without her knowledge or consent, and procured one payable to his mother, it was held that, according to the conditions attached, no beneficiary acquired any vested rights which the insured might not defeat by designating a new beneficiary.[106] A provision in a charter or by-laws of a society and in the certificate, allowing the insured to change the beneficiary, will not prevent the parties from making a contract which will vest the interest in the designated payee, and which will compel the society to recognize him as the one who is legally entitled to the proceeds of the insurance certifi-

[102] Robinson v. Mutual Acc. Assn. (U. S. C. C. E. D., Mo. 1895), 68 Fed. Rep. 825, per Priest, J., citing Association v. Blue, 120 Ill. 121; 11 N. E. Rep. 331; Campbell v. Insurance Co., 98 Mass. 381; Vivar v. Knights etc., 52 N. J. L. 455; 20 Atl. Rep. 36; Ingersoll v. Knights etc., 47 Fed. Rep. 272; Milner v. Bowman, 119 Ind. 448; Morrell v. Insurance Co., 10 Cush. (Mass.) 282; 57 Am. Dec. 103, and note; Glasey v. Insurance Co., 65 N. Y. St. Rep. 493; 32 N. Y. Supp. 355.

[103] Block v. Valley Mut. Ins. Co., 52 Ark. 201; 20 Am. St. Rep. 166.

[104] Fisk v. Equitable etc. Co. (Pa. 1887), 11 Atl. Rep. 84; Masonic Mut. B. Assn. v. Bunch, 109 Mo. 560, 579, 580, per Gantt, P. J.

[105] Knights Templar F. & M. L. Indem. Co. v. Grant, 49 Ill. App. 262.

[106] Appeal of Beatty (Pa. 1888), 15 Atl. Rep. 861.

cate.[107] If the charter of a society prohibits the insured from changing the beneficiary after one has been designated, then the beneficiary acquires a vested interest in the certificate, of which he cannot be deprived by the insured.[108] A right to the benefit fund becomes vested in the wife on the death of her husband where it is payable to her, and in case of her death, to her children, if she survives the insured.[109] If, under the constitution of a benefit society, a member may surrender his certificate, the beneficiary in the certificate of such a society has no vested interest therein so as to prevent its surrender.[110] The wife takes no vested interest till the member's death, even though the statute provides that insurances for the benefit of wife and children shall be vested in them, exempt from claims of creditors.[111] The question whether the interest of the beneficiary, under a mutual benefit certificate, is a vested one arises in those cases where there is no provision, either in the rules, regulations or by-laws, etc., of the society, or in the certificates, which either expressly forbid a change of beneficiary, or, on the other hand, are expressly permissive of a change. The majority of the cases hold that where the power of appointment is given to a member, with no restriction thereupon, and the certificate is both by its own terms and the provisions of the charter or by-laws of the association simply payable to the beneficiary named therein, it cannot be presumed that the beneficiary first named acquires a vested interest which the member cannot defeat by the subsequent designation of another beneficiary. The contract is between the member and the organization, and in such case, the certificate being simply pay-

[107] Smith v. National B. Soc., 123 N. Y. 88, per Finch, J.; 25 N. E. Rep. 197, per Finch, J.; 9 L. R. Annot. 616; Maynard v. Vanderwerker, 30 Abb. N. C. (N. Y.) 134; 24 N. Y. Supp. 932. See secs. 731 and 742, herein.

[108] Presbyterian Fund v. Allen, 106 Ind. 595, 596; Supreme Lodge K. of P. v. Knight, 117 Ind. 489; Olmstead v. Masonic Mut. B. Soc., 37 Kan. 93; Van Bibber v. Van Bibber, 82 Ky. 347; Thomas v. Leake, 67 Tex. 472.

[109] Chartrand v. Brace, 16 Colo. 19.

[110] Usels v. Covenant Mut. B. Assn. (Mo. 1895), 29 S. W. Rep. 607.

[111] Fischer v. American Legion of Honor, 168 Pa. St. 279; 31 Atl. Rep. 1089; Act April 15, 1868 (Pub. Laws, 103).

able to such person or persons as the insured may designate, the member cannot, in the absence of any provision forbidding such a change, be deprived of the right of changing the beneficiary. The free and proper exercise of this right requires its continuance till death. This distinction between the rights of the beneficiary under a regular life insurance policy and under a mutual benefit certificate has generally been made by the courts, and is clearly supported by the weight of authority.[112] In a case, however, which arose in Arkansas[113] it appeared that a member of a mutual benefit society, who had three sons and one daughter, had procured a certificate payable to his "children," and had subsequently to its issuance inserted after the word "children" the names of his three sons only, and it was held, since there was no provision in the certificate or by-laws for a change of beneficiaries, that the daughter acquired a vested right under the certificate.[114]

§ 742. **Beneficiary may Acquire Vested Interest Under Contract with Member.**—The fact that a change of beneficiary is permitted does not prevent a contract between the member and the beneficiary, whereby a vested interest may pass to the latter, and if the member designates a beneficiary, with the agreement that the latter shall pay all the assessments, and he pays them, a vested interest is acquired, which cannot be divested by another designation without the original benefi-

[112] See preceding cases under this section.

[113] Johnson v. Hall, 55 Ark. 210; 17 S. W. Rep. 874.

[114] The court, per Hughes, J., said in this case: "According to the decision in Block v. Valley Ins. Assn., 52 Ark. 202, the contract in the case at bar and the benefit certificate issued by the society constitute an ordinary insurance policy; and the party obtaining it has no power to change the beneficiary named in the certificate, unless expressly authorized to do so by the policy itself or by the articles of association or by-laws of the society, where these are by the terms of the policy made a part of it. The rights of the persons for whose benefit a contract of insurance is made, as held in the case cited, 'arise out of and depend upon contract, and must be ascertained and fixed by contract.' It follows, therefore, that the beneficiaries in such a contract of insurance do acquire a vested right, of which they cannot be deprived by change of the beneficiaries, unless such change is expressly authorized as stated herein."

ciary's consent.[115] But the insured and the insurer cannot so stipulate in a certificate as to defeat the rights of those whom the charter declares to be beneficiaries.[116]

§ 743. No Vested Right Though Beneficiary has Possession of Certificate.—If the by-laws provide that the member may surrender his certificate and procure a new one, designating another person as beneficiary, such member does not, by naming a beneficiary and transferring the possession of the certificate to him, thereby convey to him any vested right or interest in the benefit during the member's life, and the lat-

[115] Maynard v. Vanderwerker, 76 Hun (N. Y.), 25; 27 N. Y. Supp. 714; 24 N. Y. Supp. 932; 30 Abb. N. C. (N. Y.) 134. It was held in this case that the finding that the agreement was made was not sustained by the evidence, Cullen, J., dissenting: Smith v. National Ben. Soc., 123 N. Y. 85; 25 N. E. Rep. 197; 51 Hun (N. Y.), 575. The court said in this case, referring to the statute (Laws 1883, sec. 18, c. 175) providing for incorporation of co-operative life insurance societies, and giving the member a right to change his beneficiary without the latter's consent: "That section attaches the beneficial interest to the membership, and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable at any moment, there can be no vested interest in the named beneficiary, any more than in the legatee of a will before it takes effect. But the statute does not prevent a contract between the parties by force of which a vested interest does pass, in which respect the present case differs from Hellenberg v. District No. 1 I. O. of B. B., 94 N. Y. 580. There the designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and remaining wholly within his control. Here the transfer was a collateral security for an existing debt, and the fact brought to the knowledge of the defendant company which explicitly promised to pay the plaintiff in his character as creditor": Id. 88, per Finch, J. See sec. 731, herein.

[116] So held in Duvall v. Goodson, 79 Ky. 224. The court, per Cofer, C. J., said: "We decided in the case of this company against Miller, 13 Bush (Ky.), 494, that 'it is not in the power of the company or of the member, or of both, to alter the rights of those who by the charter are declared to be beneficiaries, except in the mode and to the extent therein indicated,' and we held in that case that even if Miller and the company had intended by the stipulation in the certificate to make the proceeds of his membership payable to his administrators or creditors, such stipulation could not have defeated the rights of those whom the charter declares to be beneficiaries": Id. 229.

ter may surrender his certificate and procure a new one to the exclusion of the first-named beneficiary; and this has been so held even though the member regains possession of the certificate by false and fraudulent representations.[117] So it is held in Missouri that neither the possession of the certificate nor the payment of assessments by the beneficiary deprives the member of the right to change the beneficiary.[118] If, however, the constitution provides that the designated beneficiary shall be entitled to the fund and makes no provision as to changing the beneficiary, and the certificate is held by the party so designated, he is entitled to the fund as against one designated by will to receive the fund.[119]

§ 744. Provisions as to Designation or Change of Beneficiary in Charter, By-laws, etc., Must be Complied with if Possible. — The charter or constitution and by-laws are the source of power in associations or societies of this character;[120] so that if they prescribe a certain mode by which the beneficiary, under a benefit certificate, shall be changed, this mode must be complied with, so far, at least, as is possible.[121] So where the constitution of a society provided

[117] Brown v. Grand Lodge A. O. U. W., 80 Iowa, 287; 20 Am. St. Rep. 420. See secs. 730, 849, herein.

[118] Masonic B. Assn. v. Bunch, 109 Mo. 560, 579, 580, per Gantt, P. J., citing Benefit Soc. v. Burkhart, 110 Ind. 189; Richmond v. Johnson, 28 Minn. 447; Splawn v. Chew, 60 Tex. 534.

[119] Silva v. Supreme Coun. Port. Un. (Cal. 1895), 25 Alb. L. J. (N. S., Vol 5) 65.

[120] Masonic B. Assn. v. Bunch, 109 Mo. 579, per Gantt, P. J., citing Van Bibber v. Van Bibber, 82 Ky. 347; Duvall v. Goodson, 79 Ky. 224; Arthur v. Benefit Assn., 29 Ohio St. 557; Benefit Soc. v. Clendennin, 44 Md. 433; Bacon's Benefit Societies, sec. 237.

[121] Highland v. Highland, 13 Ill. App. 510; Holland v. Taylor, 111 Ind. 127; Wendt v. Iowa L. of H., 72 Iowa, 682; 34 N. W. Rep. 470; Stephenson v. Stephenson, 64 Iowa, 534; Leaf v. Leaf, 92 Ky. 166; 17 S. W. Rep. 354; Daniels v. Pratt, 143 Mass. 216; Supreme L. K. of H. v. Nairn, 60 Mich. 44; Coleman v. Knights of Honor, 18 Mo. App. 189; American L. of H. v. Smith, 45 N. J. Eq. 466; Greeno v. Greeno, 23 Hun (N. Y.), 478; Ireland v. Ireland, 25 N. Y. Week. Dig. 335; Elliott v. Whedke, 94 N. C. 115; National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111. But see Manning v. Ancient O. U. W., 86 Ky. 136; 5 S. W. Rep. 385; Splawn v. Chew, 60 Tex. 532. Change of beneficiary must conform to requirements of the constitution and by-laws:

that a change of the beneficiary must be made on certain blanks, and entered on certain books, and the member, who had named his wife as beneficiary, had subsequently assigned the certificate to his creditors without complying with the provision of the society, it was held that the wife, whose name was regularly inserted in the books, was entitled to the fund.[122] In another case, where the constitution of a lodge provided that any member desiring to change his beneficiary might do so, by authorizing such change in writing on the back of his certificate in a prescribed form, attested by the recorder, with the seal of the lodge attached, it was held that a new certificate issued by him, in conformity with such provision, was valid in the absence of fraud, although the recorder had failed to witness the signature of the member to the request for a change, and had signed and sealed the attestation.[123] So also where the by-laws provided that, in order to change the beneficiary, the certificate must be surrendered, and a new one issued, the fact that the insured who subsequently married, intended to name his wife as beneficiary, and for that purpose delivered the policy to his brother with instructions to effect the change, will not defeat the right of the first-named beneficiary where the certificate is not surrendered before the insured's death, even though the member had requested, and the secretary had agreed, to have the change made.[124] A provision in the certificate that the beneficiary may be changed at any time by a compliance with the laws of the organization, refers to the laws which are in existence at the time of the change, and not at the time of the issuance of the certificate;[125] and where the certificate provided that any change of beneficiary must be in

Jinks v. Banner Lodge, 139 Pa. St. 414; affirming 37 Pitts. L. J. (Pa.) 446.

[122] Hotel Men's B. Assn. v. Brown (U. S. C. C. Ill. 1887), 33 Fed. Rep. 11.

[123] Simcoke v. Grand Lodge A. O. U. W., 84 Iowa, 383; 51 N. W. Rep. 8.

[124] McLaughlin v. McLaughlin (Cal. 1894), 104 Cal. 171; 37 Pac. Rep. 865; 39 Cent. L. J. 427.

[125] Supreme Coun. Cath. K. of America v. Morrison, 16 R. I. 468; 17 Atl. Rep. 57; Supreme Coun. Cath. K. of America v. Franke, 137 Ill. 118, 122; 27 N. E. Rep. 86.

compliance with the laws of the society, and there was a provision in the constitution at the time the certificate was issued that no change in the beneficiary could be made except with his consent, which was subsequently repealed, it was held that consent of the beneficiary was not necessary to a new appointment after such repeal, and that thereafter a change could be made by complying with the laws of the society then in force.[126] And where the by-laws provided that if at any time the member desired to change the beneficiary, he should surrender the certificate, and a new one would be issued payable to the new beneficiary, it was held that a person whose name was written in a blank space following the name of the original beneficiary could not claim the fund, and the person first named was entitled to recover.[127] If the by-laws and rules of a mutual benefit society provide for a change of beneficiaries upon compliance with certain requirements, and that the lodge shall thereupon issue a new certificate to certain persons, the society has no discretion as to the change, which is conclusive concerning compliance with said rule, and exclusive of a determination thereupon by the court.[128] And again, where the by-law of a mutual benefit society provided that the member should sign his designation of the beneficiary, it was held that merely writing the names of certain persons on the blank provided for that purpose, without the member's signing, did not constitute a sufficient designation.[129] So, also, in another case, where the by-laws of the society provided that a member might change the beneficiary in his certificate, by surrendering the certificate and paying a certain fee, whereupon a new certificate would be issued, it was held that it was not sufficient, to effect a change, for the member to merely indorse upon the certificate a direction to pay the benefit to another than the

[126] Supreme Coun. Cath. K. of America v. Franke, 137 Ill. 118; 27 N. E. Rep. 86.

[127] Thomas v. Thomas, 131 N. Y. 205; 60 Hun (N. Y.), 382; 42 N. Y. St. Rep. 873; 30 N. E. Rep. 61; 21 Ins. L. J. 464; distinguishing Luhrs v. Luhrs, 123 N. Y. 367; 25 N. E. Rep. 388; citing Scott v. Provident Mut. Rel. Assn., 63 N. H. 556; 4 Atl. Rep. 792; Lodge v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Bacon's Benefit Societies, secs. 240, 284.

[128] Scholl v. Sadoury (Pa. 1894), 25 Pitts. L. J. 43.

[129] Elliott v. Whedbee, 94 N. C. 115.

person originally designated.[130] But where the by-laws provided that to effect a valid change of beneficiaries the member should indorse upon the certificate the name of the new beneficiary and affix his signature to the indorsement, it was held that such an indorsement by the president of the lodge, in accordance with a verbal message from the member, was sufficient to effect the change, especially where the same had been ratified by the association by payment to the new beneficiaries as directed.[131] Though the by-laws may prescribe a certain manner in which the beneficiary shall be designated, the courts have, in some cases where the certificate has been made payable to some person in a manner not in conformity with the by-laws, applied the doctrine of equitable relief, considering that as done which ought to be done.[132]

§ **745. When Mode Prescribed by Charter Differs from General Rule of Law.**—Whatever may be the rule, when the charter does not provide a mode of exercising corporate power, it is quite clear that where the charter does prescribe the mode it must be followed, even though it requires a procedure different from the one prescribed by a general rule of law.[133]

§ **746. Change of Beneficiary—Exceptions to the Rule that By-laws Must be Followed.**—Although as a general rule, the provisions of the by-laws and policy relating to a change of beneficiary must be followed, nevertheless there are certain exceptions thereto. Thus, 1. If the society has waived a strict compliance with its own rules, and has issued a new certificate to insured upon his request to change the beneficiary, the original beneficiary cannot avail himself of the noncompliance with the by-laws; 2. If assured is unable to comply literally with the regulations, equity will treat the

[130] Jinks v. Banner Lodge etc. K. of H., 139 Pa. St. 414; 21 Atl. Rep. 4.

[131] Schmidt v. Iowa Knights of P. Assn., 82 Iowa, 304; 47 N. W. Rep. 1032; 11 L. R. Annot. 205.

[132] Nally v. Nally, 74 Ga. 669.

[133] Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 597, per Elliott, J.

change as legally made; 3. If assured does all in his power to change the beneficiary in accordance with the requirements of the by-laws, but dies before the issuance of the new certificate, equity will decree that to be done which ought to be done, and act as though the certificate were issued.[134] Again, the member, without any fault of his own, may be unable to comply with the requirements of said laws, as in case of an amendment naming certain persons who may be beneficiaries, but the member has no relatives, etc., within that class, and this rule is especially true where a construction requiring strict compliance would operate as a complete destruction of members' rights, and as a repudiation by the society of its obligations.[135] If the approval of the board of managers of a relief association is necessary in order to complete the designation of a beneficiary, their approval may be presumed from the retention of the designation for an unreasonable period of time without objection.[136] So a mutual benefit association may waive formalities required in its charter as to changing the beneficiary, and pay the benefits to the new beneficiary, although the new direction made as to its payment was not made by assured in the mode pointed out by the organic law of the association, and notwithstanding it is a rule of law of insurance that when

[134] Supreme Conclave Royal Adelphia v. Capella, E. D. (Mich. 1890) 41 Fed. Rep. 1, per Brown, J. Upon the first exception the court says: "This naturally follows from the fact that having no vested interest in the certificate during the lifetime of the assured, he has no right to require that the rules of the association which are framed alone for its protection and guidance are not complied with." Id. 4, citing Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 626; 18 N. E. Rep. 657; Splawn v. Chew, 60 Tex. 532; Manning v. Ancient O. U. W., 86 Ky. 136; 5 S. W. Rep. 385; Society v. Lupold, 101 Pa. St. 111; Brown v. Mansur, 64 N. H. 39; 5 Atl. Rep. 768; Knights of Honor v. Watson, 64 N. H. 517; 15 Atl. Rep. 125; Byrne v. Casey, 70 Tex. 247; 8 S. W. Rep. 38; Titsworth v. Titsworth, 40 Kan. 571; 20 Pac. Rep. 213; citing on the second exception, Grand Lodge v. Child, 70 Mich. 163; 38 N. W. Rep. 1; and citing on the third exception, Association v. Kirgin, 28 Mo. App. 80; Mayer v. Association, 2 N. Y. Supp. 89; Supreme Lodge v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Kepler v. Supreme Lodge, 45 Hun (N. Y.), 274.

[135] Wist v. Grand Lodge A. O. U. W., 22 Or. 271; 29 Pac. Rep. 610; 29 Am. St. Rep. 603. See sec. 750, herein.

[136] Hanson v. Minnesota S. R. Assn., 59 Minn. 123; 60 N. W. Rep. 1091.

a policy is issued the right to the benefit at once vests in the beneficiary, and the assured has no power subsequently over the insurance.[137] Again, where the constitution of a benefit association provides that an application for a change of beneficiary shall be filed within thirty days of its date, the association may waive this provision by the issuance of a certificate, naming the new beneficiary.[138] It is held in the New Jersey court of equity that if the beneficiaries of a corporation are prescribed by law, it is an evasion of its policy and a violation of its charter to say that where a member has named a person not within the class to be benefited, and the corporation has issued the certificate to such person, such acts shall deprive the proper person, or class of persons, of all right or interest in the fund.[139]

§ 747. Mere Regulation or Matter of Practice not Binding as to Change of Beneficiary.—The assured, in changing his beneficiary, is not bound by a mere regulation or matter of practice for the convenience of the company of which the members have no notice, and this rule applies even though such regulation is indicated by the blank on the back of the certificate, where such regulation is no part of the constitution or by-laws of the association, and this is especially so where the disposal of benefits may be made by the mere direction of assured, and there is no rule or regulation relating to such change with which the member has failed to comply.[140]

[137] Manning v. Ancient O. U. W., 86 Ky. 136; 9 Am. St. Rep. 270.

[138] Adams v. Grand Lodge A. O. U. W. (Cal. 1895), 105 Cal. 321; 38 Pac. Rep. 914.

[139] Britton v. Supreme Council, 46 N. J. Eq. 102; 19 Am. St. Rep. 376. In this case the certificate named a creditor, who was given possession of the certificate, but he was not within the class designated, and the action was brought by the member's mother, and she was held entitled under the statute regulating descents in that state.

[140] Hirschl v. Clark, 81 Iowa, 200, 206, 207, per Rothrock, C. J.; 47 N. W. Rep. 78. In this case a written instrument duly executed by assured, and forwarded by mail at his instance to the association, recited that he thereby surrendered the benefit certificate, and directed a new certificate, changing the beneficiary, to be issued, and it was held that a valid change of beneficiary was effected, even though the original certificate was not surrendered as required

§ 748. Effect of Subsequent Change of By-laws.—As a general rule, mutual benefit societies have the right to alter, amend, or repeal their laws or to enact others consistent with the purpose for which they are organized, but they cannot so exercise the right as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members.[141] If the rules of a mutual benefit society provide that the by-laws may be amended at any time, both the member and beneficiary will be bound by amendments passed subsequently to the issuance of the certificate which do not interfere with vested rights. In such a case, by-laws in existence when the certificate was issued, providing that the beneficiary cannot be changed without his consent, may be subsequently amended so as to permit the member to change the beneficiary without the latter's consent. If the beneficiary is so changed, the person last designated is entitled to the fund.[142] A beneficiary under a certificate in the endowment rank of a benevolent association is subject to a validly enacted law of the order forfeiting claims against the rank, where the member commits suicide, even though such law is passed after the certificate is issued, where the certificate is based on full compliance by the member with the regulations, and the application stipulates compliance with regulations of the order governing the rank then existing or that may be thereafter enacted.[143] But where a mutual benefit society, in its application for membership, provided that a member would be enti-

by a regulation or practice of the company; said regulation being of the character noted in the text above, and this was held so, although the association never assented to the change, nor issued a new certificate, as directed, before the insured's death. This case was distinguished from Stephenson v. Stephenson, 64 Iowa, 534, on the ground that "in that case the by-laws which were made a part of the contract made specific provisions as to the manner of changing the beneficiary": Id. 207.

[141] Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 29 Am. St. Rep. 603; 29 Pac. Rep. 610.

[142] Thesing v. Supreme Lodge Cath. K. of America, 24 Week. L. Bull. 401; Catholic K. of America v. Kuhn, 91 Tenn. 214; 18 S. W. Rep. 385; Byrne v. Casey, 70 Tex. 247; 8 S. W. Rep. 38.

[143] Supreme L. K. of P. of the W. v. La Malta (Tenn. 1895), 31 S. W. Rep. 493.

tled to benefits of the society upon condition that there should be a compliance with all the existing regulations of the society and all regulations thereafter adopted, it was held that a subsequent amendment, which provided that each member "shall designate" a person as beneficiary "who shall in every instance" be either a member of his family and a blood relation, or a dependent upon him, did not have a retroactive effect so as to invalidate the prior designation of the beneficiary in a certificate made prior to the amendment, and, even if held retroactive, it did not apply where it was impossible for a member, without any fault of his own, to comply with its requirements.[144] If a member is to receive a certain sum under a certificate, or a certain proportionate part thereof, after a stated period, if living and in good standing, he is not bound by subsequent amendment of the by-laws limiting the amount holders of certificates are to receive to a certain per cent of the sum due on the certificate when such member shall have reached the expectation of life and become totally disabled, even though the certificate is subject to existing regulations, laws, and rules or those subsequently adopted.[145] If the society has become indebted to the beneficiary in a certain amount, it cannot subsequently to the time when the indebtedness becomes a fixed liability pass by-laws affecting the amount of recovery or the right of the beneficiary to recover. Thus, where a society agreed to pay the widow of a member during her widowhood a certain sum per week upon the member's death, it was held that it could not, after the member's death, pass a by-law repealing the provision as to weekly payments, and providing for the levying of an assessment and the payment of the amount thereby realized to the widow so as to affect her rights as to the weekly payment.[146]

[144] Wist v. Grand Lodge A. O. U. W., 22 Or. 271; 29 Am. St. Rep. 603; 29 Pac. Rep. 610.

[145] Hale v. Equitable Aid Union, 168 Pa. St. 377; 31 Atl. Rep. 1066.

[146] Coyle v. Father Matthew Total Ab. M. B. Soc., 17 N. Y. Week. Dig. 17; affirmed 29 Hun (N. Y.,, 674. See, also, Pellazino v. German Cath. St. Joseph Soc. (Ohio), 16 Week. L. Bull, 27. In this last case the right to amend was reserved. The member had been in good standing in the society for sixteen years. Members were entitled to three dollars per week while unable to pursue their usual business,

So if the by-laws provide that a member paying for a specified time and remaining in good standing shall be entitled to receive a specified sum, but not specifying when, and the articles of association provide that the constitution and by-laws may be changed, a change in a by-law limiting the time of suing applies only to subsequently issued certificates.[147] Upon the member's death, the liability of the company is a fixed one. It is indebted to the beneficiary to a certain amount, and can pass no laws which may lessen that indebtedness.

§ 749. Amendment as to Payees does not Necessitate Changing of Beneficiary.—Although a by-law may be amended as to the persons entitled to receive the fund, yet this does not necessitate changing a designation previously made. Thus, if by amendment of the constitution of the society, if a marriage is contracted the policy is to be payable to the widow, or, in case of her death, to their joint issue, unless otherwise ordered, a designation of his mother by the member made before the adoption of the amendment, in conformity with the then existing constitution, makes the policy payable to the mother, since it is not incumbent upon him under the amendment to designate another beneficiary, and this is so even though he was deceased, leaving a widow.[148]

and another by-law guaranteed such benefits to sick members, though in public charitable institutions. The member became insane, was sent to an asylum, but escaped, remained at home some time, and returned. An amendment was made to the by-laws limiting members to benefits for thirteen weeks in each year. The court, per Harmon, J., said: "That members whose rights to benefits have become fixed by illness are liable to have them lessened or taken away entirely by such amendments was decided in Fugate v. Mutual Soc. St. Joseph, 46 Vt. 362; but the court's reasoning and conclusion are so wide a departure from the common principles of our system of law and of natural justice, that I should hesitate to follow them, if that case were the only authority on the subject. I am certainly not willing to do so after reading Poultney v. Bachman, 62 How. Pr. (N. Y.) 466; Gundlach v. German Mech. Assn., 4 Hun (N. Y.), 339, and Herschel on the Law of Fraternities, etc., p. 61." And it was also declared that the right to modify a contract does not include the right to repudiate a debt.

[147] Cohen v. Supreme Cit. of O. of I. H. (Mich. 1895). 63 N. W. Rep. 304.

[148] Benton v. Brotherhood of R. R. Brakemen, 146 Ill. 570; 34 N. E. Rep. 939.

§ 750. Where Provision as to Mode of Change of Beneficiary Cannot be Complied with—Loss of Certificate. Though the regulations of the society provide that the beneficiary cannot be changed except by the surrender of the certificate, yet if the insured is unable to comply with such provision, either because of the loss of the certificate or because the same has been wrongfully taken or retained from him, the courts will, notwithstanding such nonsurrender, recognize the subsequent designation as a valid one where it is otherwise valid, and the claim will be enforceable in equity. The insured cannot be compelled to perform impossibilities.[149] So that if the change of beneficiary is properly made, so far as the member's acts are concerned, and it is the duty of the lodge to issue a new certificate, it has no discretion, and the new beneficiary may claim the fund.[150] Thus it is held in Michigan, that if a member after divorce from his wife, who is named as beneficiary, is unable to obtain possession of the certificate, and makes a sworn statement to such effect, and also that he desires a change, and then wills to another the benefit fund, a valid change is effected, even though the rules provide that the desire for change must be indorsed upon the back of the certificate.[151] So in another case in that state the by-laws of a society provided that the beneficiary might be changed by a writing, in a certain prescribed form, on the back of the certificate authorizing such change, and that the same should be altered by an officer of the society. A member, before his death, desired to make a change, but could not obtain the certificate, which had either been lost or mislaid without his fault, and it was held that equity would recognize his disposition of the fund by will as a valid designation of a new beneficiary.[152] Where the by-laws of a benefit society permitted the insured to change the beneficiary upon surrendering his certificate and complying with certain requirements, and the insured, desiring

[149] Isgrigg v. Schooley, 125 Ind. 94; 25 N. E. Rep. 151; Grand Lodge v. Child, 70 Mich. 163; 38 N. W. Rep. 1. See sec. 746, herein.

[150] Scholl v. Sadowry (Pa.), 42 Pitts. L. J. 43.

[151] Ancient O. U. W. v. Kohler (Mich. 1895), 63 N. W. Rep. 897.

[152] Grand Lodge A. O. U. W. v. Noll, 90 Mich. 37; 51 N. W. Rep. 268. See section in this chapter on designation by will.

to change the beneficiary, complied with all the rules except that requiring the surrender of the certificate, and he was unable to comply with this as the first beneficiary, who had possession of the certificate, refused to give it up, it was held that as between the two beneficiaries, equity would regard the rule as complied with and the change complete.[153] Again, where the member named his betrothed as beneficiary in the certificate, and she subsequently married another, and the member indicated his intention to designate his son as beneficiary, and attempted so to do, but could not surrender the certificate because it was lost, it was held in a court of equity that the son was entitled to the fund.[154]

§ 751. Where Member Dies Before Change of Beneficiary is Complete.—In some cases the question has arisen as to the rights of the original beneficiary where the member has attempted to change the beneficiary, but has died before all the steps have been taken which would complete the new designation. In most of these cases there has been a requirement that the member surrender the old certificate, and that there should be the issuance of a new one payable to the new beneficiary, and where, in accordance with such rules, the member has surrendered the old certificate, but has died before the issuance of the new one, the rights under the certificate is a matter to which the courts have given much consideration. In a case which arose in the federal courts[155] the court held, under a similar state of facts, that if the insured had pursued the course pointed out by the laws of the association, and had done all in his power to change the beneficiary, but before the new certificate was actually issued he died, a court of equity would treat such certificate as having been issued.[156] As a general rule, it is probably true that if the assured has taken all the steps necessary, and otherwise done all in his power

[153] Jory v. Supreme Council A. L. of H., 105 Cal. 20; 38 Pac. Rep. 524.

[154] Grand Lodge v. Child, 17 Mich. 163. See section in this chapter on equity jurisdiction.

[155] Supreme Coun. etc. v. Capella (C. C. E. D., Mich.), 41 Fed. Rep. 1.

[156] See, also, National Am. Assn. v. Keegan, 28 Mo. App. 80.

to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the officers of the society, then the change will be regarded as complete. In a case which arose in New York,[157] however, where it appeared that the member had requested a friend of his to take the certificate to the secretary of the lodge and have him attest the change of beneficiary, and thus render it complete, but the certificate was not delivered to the secretary until after the member's death, it was held that there had not been a sufficient change of designation to defeat the right of the original beneficiary to recover.

§ 752. Where Designation of Beneficiary is Invalid. An invalid designation of the beneficiary in a benefit certificate will not render the whole contract void,[158] even though such invalid designation is in violation of a statute, as where a creditor is so designated. In such a case the personal representatives are entitled to the money due on the certificate, to hold in trust for those who were entitled to be named as beneficiaries at the time the certificate was issued.[159] If a mutual benefit society names certain classes from which the beneficiary must be chosen, and the insured member designates some one who is not of those classes, the fund will, where the society admits a liability to some one, be paid to those who sustain the required relation to the member, for a designation of a beneficiary not within the classes specified is, as already stated, invalid.[160] But although the beneficiary may not be within the required class, but it is provided that in case of his death before that of insured the heirs are to be paid the fund, the insured's executor may sue for the benefit of the heirs, for the certificate is not void.[161] So, also, if on the ground of public policy a

[157] Ireland v. Ireland, 42 Hun (N. Y.), 22.

[158] Rice v. New England Mut. Aid Soc., 146 Mass. 248; 3 Mass. (L. ed.) 146; 5 New Eng. Rep. 816.

[159] Clarke v. Swartzenberg, 162 Mass. 98; 38 N. E. Rep. 17.

[160] Parke v. Welch, 33 Ill. App. 188; Simon v. O'Brien, 87 Hun (N. Y.) 160; 33 N. Y. Supp. 815; Tyler v. Odd Fellows' Rel. Assn., 145 Mass. 134. See sec. 728, herein.

[161] Shea v. Massachusetts B. Assn., 160 Mass. 289; 35 N. E. Rep. 855; 23 Ins. L. J. 214.

person designated as beneficiary is precluded from taking the fund, the same disposition of it will be made as if no designation had been made, and said party will be considered a mere trustee; the heirs, in the absence of other disposition, to take it or the residue.[162]

§ 753. **Effect of an Invalid or Inoperative Change of Beneficiary.**— A designation of a new beneficiary, where a former one has been legally and validly designated, will not, though invalid or for any reason inoperative, revoke the original designation, for although the member may attempt to change the beneficiary, if he does not in fact make a valid and effectual change before his death, the former beneficiary will take the same as if no attempt had been made to effect a change.[163] So where a person procured a benefit certificate payable to his wife, and they were subsequently divorced, the certificate being given to her and she paying all assessments for over two years, it was held that though the member might change the beneficiary, he could only do so by complying with the rules of the society, and that where the constitution of the society prescribed certain classes from whom the beneficiary might be chosen, a designation of some one not of those classes was ineffectual, and the former wife was entitled to the fund.[164] Although the holder of certificate makes due application for a change of beneficiary, and a new certificate is issued according to request, payable to such person as may be named by will, but no beneficiaries are designated by will or otherwise, no change of beneficiaries is effected, and the contract remains as though the former certificate had never been surrendered.[165]

§ 754. **Society Only Can Set up Noncompliance with By-laws.**—If the by-laws of a society designate the man-

[162] Schonfield v. Turner, 75 Tex. 324; 7 L. R. Annot. 189; 19 Ins. L. J. 238.

[163] Elsey v. Odd Fellows' Mut. Rel. Assn., 142 Mass. 224; 7 N. E. Rep. 844.

[164] Leaf v. Leaf, 17 S. W. Rep. 354; 92 Ky. 166. There were certain equities, however, in this case which the court considered in favor of the wife.

[165] Grace v. Northwestern Mut. Rel. Assn., 87 Wis. 562; 58 N. W. Rep. 1041.

ner in which the fund may be disposed of, or contains some other provision of a similar nature which is merely directory in its nature, and is for the purpose only of perfecting the society or organization, such provision cannot be taken advantage of by third parties to claim the insurance.[166] For a failure to follow the prescribed mode in changing a beneficiary is one to which the society and not the first beneficiary can object.[167] So where the charter and constitution of a society provided for its organization for the benefit of widows, orphans, heirs, relatives, devisees, or legatees of deceased members, and the certificate designated the widow, but reserved to the member the right to change the designation in his lifetime or by will, and the constitution of the society also permitted a change without the beneficiary's consent, and the member subsequently designated a creditor of his as beneficiary, it was held that as the creditor might have been a legatee, and was therefore within the prescribed classes, the designation of the creditor as beneficiary during the member's lifetime was held merely an irregularity, which the society only could set up in defense, and the widow could not avail herself of this irregularity where it had been waived by the society.[168] In a case which arose in Iowa,[169] however, it was held that the right to object to the attempted change was not limited to the order, but that the "legal heirs" or persons entitled to claim as beneficiaries might avail themselves of such noncompliance with the by-laws, for the purpose of showing that no change in law had been effected.

§ 755. Statutes Relative to Designation of Beneficiary.— The statutes of some states designate the classes from which the beneficiary may be chosen by a mem-

[166] Titsworth v. Titsworth, 40 Kan. 571; 20 Pac. Rep. 213; Manning v. Ancient O. U. W., 86 Ky. 136; 5 S. W. Rep. 385; Knights of Honor v. Watson, 64 N. H. 517; 6 New Eng. Rep. 888; Splawn v. Chew, 60 Tex. 532.

[167] Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 629.

[168] Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 620; 18 N. E. Rep. 657.

[169] Wendt v. Iowa L. of H., 72 Iowa, 682.

ber of a benefit society. Under an Ohio statute[170] of this nature, which provided for the payment of money to "the families or heirs of the deceased members," it was held that the member could not designate for payment any person who was not a member of his family, or one who would not on his death become an heir.[171] Under the New York laws of 1883,[172] relating to the formation of associations upon the co-operative or assessment plan, it is held that as they contain no restriction upon the class from which the beneficiary may be chosen, a member of a benefit society may designate any person as beneficiary, though not a relative, provided the by-laws contained no restriction.[173]

§ 756. Statutes Relative to Change of Beneficiary. In several of the states statutes have also been passed relative to the right of the insured to change the beneficiary.[174] Generally, these acts permit the insured to change the beneficiary without the consent of the beneficiary originally appointed. The insured cannot, however, under such enactments, defeat the right of the original beneficiary, whose interest has become a vested one under the contract for a valuable consideration.[175] Under the New York laws,[176] which provide that the beneficiary may be changed upon the consent of the society in accordance with the by-laws, a mere indorsement upon a certificate which directs payment to a person not named therein

[170] Ohio Rev. Stat., 3630.

[171] National Mut. Aid Assn. v. Gonser, 43 Ohio St. 1. See, also, Michigan Mut. B. Soc. v. Hoyt, 46 Mich. 472.

[172] Chap. 175.

[173] Eckhert v. Mutual Rel. Soc., 17 N. Y. St. Rep. 877.

[174] In New York, "membership in any such society, order, or association shall give to the member the right at any time, upon the consent of such society, order, or association, in the manner and form prescribed by its by-laws, to make a change in its payee or payees, beneficiary or beneficiaries, without requiring the consent of such payees or beneficiaries": Laws N. Y., c. 690, art. 7, sec. 238; Gen. Laws, c. 38; Hamilton's Stat. Rev. Laws N. Y. 1894, p. 107 of Ins. Laws; Laws 1889, c. 520, secs. 11, 12; Iowa, McClain's Annot. Code, 1888, sec. 1767; Kan. Gen. Stat. 1889, sec. 3464; Mich. Pub. Acts, 1887, c. 187, sec. 16, and cases following under this section.

[175] Smith v. National B. Soc., 123 N. Y. 85.

[176] Laws N. Y. 1892, c. 690, sec. 238.

is not sufficient. The consent of the society is necessary. It is necessary that it should have been delivered to or for the benefit of the person named in the indorsement.[177] So under a statute which enacts substantially that certificates of membership in societies of this character shall be regarded as contracts between the members and the society, but which also authorizes the association to change the name of the beneficiary named in the certificate on such terms and conditions as may be agreed to by the parties to the contract, such statute becomes a part of the charter and constitution of the company, and thereafter a change of beneficiary may be made by the association and the member upon such terms and conditions as may be agreed upon.[178] In a case which arose in Ontario,[179] a society which had been formed under certain statutes, which were subsequently amended,[180] issued a certificate to a person which designated his children as beneficiaries, and subsequently, having married again, he obtained a new certificate payable to his second wife, and it was held that the certificate was subject to the provisions of the statutes of Ontario,[181] and that the

[177] Armstrong v. Warren, 90 Hun (N. Y.), 217; 64 N. Y. St. Rep. 291.

[178] Masonic Mut. B. Soc. v. Burkhardt, 110 Ind. 189, 191; 11 N. E. Rep. 49.

[179] Mingeaud v. Packer, 21 Ont. Rep. 267.

[180] Rev. Stat. Ont. 1877, c. 167; amended, 41 Vict., c. 8, sec. 18; now Rev. Stat. Ont. 1887, c. 172. Section 11, chapter 172, Rev. Stat. Ont., provides that "when on the death of a member of a society any sum of money becomes payable under the rules of the society, the same shall be paid by the treasurer or other officer of the society to the person or persons entitled under the rules thereof." Section 18 of article 7 of the rules provided that any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, etc. But no change of direction shall be valid or have any binding force or effect until said change shall have been reported to the grand recorder; the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon, and the said new certificate shall be numbered the same as the old certificate.

[181] Rev. Stat. Ont., c. 136; 51 Vict., c. 22. This last act was passed March 23, 1888, being "An act to amend an act to secure to wives and children the benefit of life insurance." Section 1 of said act provided that the expressions "contract of insurance" and "policy,"

rules of the society, so far as they were inconsistent with such provisions, were modified and controlled by them, and the certificate became atrust for the children, and ceased, so long as the trust remained, to be under the control of the deceased member, and that he was not authorized to revoke the certificate and replace it by a subsequent one. On appeal this decision was affirmed by two judges,[182] while two other judges adopted the view that the rules of the society giving a power of revocation formed a valid part of the contract of insurance under the Ontario statute,[183] and that this power of revocation was not taken away or restricted by the amended statute.[184]

SUBDIV. II. Particular Designations and Effect of Same.

§ **763. "Absent Brother" as Beneficiary.**—"Absent brothers," under a rule relating to benefit funds and those entitled thereto, includes one who is not within the jurisdiction of the lodge, irrespective of his legal residence, and means one who happens to be at the time, either permanently or temporarily, out of the jurisdiction of the lodge or tribe.[185]

§ **764. "Affianced Wife"—Betrothed as Beneficiary.** In this, as in other cases relating to associations of the character under consideration, whatever forms the basis of the association's existence, and constitutes a part of the contract, must be looked to in order to ascertain whether an "affianced wife" of or one betrothed to the member is entitled to the fund. Sometimes in these as in other cases the strict rules will not be followed where equity would demand a departure there-

wherever they occurred in said original act, included any certificate or contract mentioned, and in any way relating to life insurance, and section 2 provided that the act should extend and apply to membership, beneficiary, and other certificates and contracts relating to life insurance issued or entered into by fraternal, benevolent, etc., societies, having for its purpose the insurance of lives of members exclusively.

[182] 19 Ont. App. 290; 12 Can. L. T. 307, per Hagerty, C. J. O., and Burton, J. A.

[183] Rev. Stat. Ont., c. 172, sec. 11.

[184] Rev. Stat. Ont., c. 136, secs. 5, 6, per Osler and Maclennan, JJ. A.

[185] Walsh v. Cosumnes Tribe I. O. R. M., 108 Cal. 496, 500; 41 Pac. Rep. 418.

from, and bring the beneficiary either within the rules by construction, where this is possible, or otherwise aid such beneficiary. It seems, however, to be the general rule outside of equitable grounds that the "affianced wife" or betrothed must be within the class designated by a fair construction of the words expressly used to designate the class, unless there is a waiver, or equity demands a departure from the rules. The mere fact of being an affianced wife does not of itself make one a dependent, however.[186] Under a provision of the by-laws of a society that a member may at any time surrender his certificate and procure a new one payable to some new beneficiary, and in the event of death of the original beneficiary, no other disposition being made, the benefit is to go to the dependent heirs of the member, and the first-named beneficiary dies, a designation in a will of the member's betrothed as beneficiary in a new certificate will not be a valid designation, where he contributes nothing to her support, and she is in no way dependent upon him.[187] So where a benefit certificate was made payable to the "affianced wife" of the member, and the statute provided for the formation of societies for "the purpose of assisting the widow, orphans, or other relations of deceased member, or any person dependent upon a deceased member," it was held that upon the member's death the next of kin was entitled to the fund, where it appeared that the "affianced wife" of the member was not dependent upon him for support.[188] But if a woman, at her intended husband's request, leaves an employment which affords her support for one which does not, and receives a weekly sum from him to make up the difference, she is a "dependent," and entitled to the fund when named as beneficiary, for if one is dependent in part, it cannot be said that he is not a "dependent." [189] In an Illinois case it is held that

[186] McCarthy v. New England O. of Prot., 153 Mass. 318; 26 N. E. Rep. 868.

[187] Supreme Council v. Perry, 140 Mass. 580. See section on dependents in this chapter. See sec. 1057, herein.

[188] Palmer v. Welch, 132 Ill. 141; 23 N. E. Rep. 412; Supreme Coun. Am. L. of H. v. Perry, 140 Mass. 580; 5 N. E. Rep. 634.

[189] McCarthy v. New England O. Prot., 153 Mass. 314; 26 N. E. Rep. 868.

if the beneficiary, at the time of the issuance of the certificate, and at insured's death, be his affianced wife, she will take under a designation "to his wife." [190]

§ **765. "As he may Direct."**—The words "or as he may direct," following an enumeration of classes of persons who may be beneficiaries, has the effect of enlarging the designation so that it operates substantially as if no classes or persons had been named, and the preceding enumeration of persons or classes will not restrict the right to designate others not within said classes. Thus, under a provision that the fund shall be payable to certain persons, his "family, or as he may direct," the insured may designate any person as beneficiary, though no relative of his,[191] and the last certificate which is issued to him will control the destination of the fund.[192] But although the charter or by-laws may provide that the fund shall be paid "as the member may direct," this will not prevent the passage of a by-law prescribing the manner in which the payment of the fund shall be directed, when the by-law is a reasonable one.[193] But if the charter and by-laws provide that the member may at any time surrender his certificate and procure a new one, payable as he may direct, he cannot, it is held, designate a new beneficiary by will.[194] The words "as he may direct" may, however, be qualified or limited by other words, as where the right to make such designation or change of beneficiaries is restricted to such beneficiaries dependent upon the member as he may direct.[195]

[190] Bachman v. Knights & L. of H., 44 Ill. App. 188. The insured was one Bachman, and the designation was "to his wife, Cecilia Bachman."

[191] Mitchell v. Grand Lodge, 70 Iowa, 360; 30 N. W. Rep. 365. See Highland v. Highland, 109 Ill. 366; Lodge v. Todd, 5 Lea (73 Tenn.), 716.

[192] Knights of Honor v. Watson, 64 N. H. 517; 15 Atl. Rep. 125.

[193] Hicks v. Perry, 140 Mass. 580.

[194] Supreme Coun. Amer. L. of H. v. Perry, 140 Mass. 580. See section in this chapter as to designation by will.

[195] Supreme Coun. Amer. L. of H. v. Perry, 140 Mass. 580; 5 N. E. Rep. 634.

§ 766. **"Children"—Where no Children Survive.**—If a policy of insurance is made payable to "the children" of the insured, and at the time of the insured's death there are no surviving children, no action can be maintained by the personal representative of the insured to recover the money, as the children only were intended to be benefited.[196]

§ 767. **"Children" does not Generally Include Grandchildren.**—As a general rule, the designation "children" should be taken in its primary meaning, and as such it will not be extended to include grandchildren.[197] This was so held where the by-law of a mutual benefit society provided for the payment to the widow of such member, if there should be one; if he should leave no widow, then to go to his child or children, or their lawful guardians for them, share and share alike; and in case the deceased member should leave no widow, child, or children, the money was to be paid to such person as he had designated in the policy in writing.[198] If, however, it

[196] So held in McElwee v. New York L. Ins. Co. (1891), 47 Fed. Rep. 798; 44 Alb. L. J. 516.

[197] Continental L. Ins. Co. v. Webb, 54 Ala. 688; United States Trust Co. v. Mutual B. L. Ins. Co., 115 N. Y. 152. "Children" may include grandchildren, but "children" does not, as a rule, include grandchildren except from necessity when will remains inoperative otherwise: Estate of Hunt, 133 Pa. St. 260; 19 Am. St. Rep. 640; Matter of Payton, 41 Hun (N. Y.), 500; Russell v. Russell, 64 Ala. 500; Matter of Brown, 29 Hun (N. Y.), 417. The last case cites Prowitt v. Rodman, 37 N. Y. 42; Scott v. Guernsey, 48 N. Y. 106; Lawrence v. Hebbard, 1 Bradf. (N. Y.) 252; Boune v. Underhill, 4 Hun (N. Y.), 130; Coles v. Brown, 4 Sand. Ch. (N. Y.) 123. See further as to "children," Winsor v. Odd Fellows' Assn., 13 R. I. 150; Oyster v. Knull, 137 Pa. St. 448; 21 Am. St. Rep. 890; Hall v. Hall, 140 Mass. 267; Palmer v. Horn, 84 N. Y. 520, 521; Feit v. Vanatta, 21 N. J. Eq. 84; Lombard v. Willis, 147 Mass. 13; Butler v. Ralston, 69 Ga. 489; Cummings v. Plummer, 94 Ind. 403; 48 Am. Rep. 167; Presley v. Davis, 7 Rich. Eq. (S. C.) 105; 62 Am. Dec. 396; Elliott v. Elliott, 117 Ind. 380; 10 Am. St. Rep. 54; Bowker v. Bowker, 148 Mass. 198; Underwood v. Robbins, 117 Ind. 308; Minot v. Harris, 132 Mass. 531; Cruse v. McKee, 2 Head (Tenn.), 1; 73 Am. Dec. 186; Estate of Schedel, 73 Cal. 594, in last case held to include grandchildren. See, also, 6 Lawson's Rights, Remedies, and Practice, p. 5194, sec. 3227, note "children," and note 46 Am. Dec. 666, "devises and bequests to children as a class." See section in this chapter on "wife if living."

[198] Winsor v. Odd Fellows' B. Assn., 13 R. I. 149.

would defeat the apparent intentions of the member or the insured to so hold, then the word may be extended so as to include grandchildren. Thus, where a policy upon the husband's life was issued to the use of his wife, and if she died before him, the amount was to be payable to her children for their use, or to their guardian, if under age. She died before her husband, and it was held that a grandchild, the issue of one of the children who died before his mother, was entitled to a share, as it was the evident intention of the insured to include the children of a deceased child.[199] And in an Iowa case it is held that if a policy is payable to the wife within a certain time after insured's death, and, if she should not be then living, to her children, and no children are living at the time the policy becomes payable, the laws of descent entitle the grandchildren to recover.[200] In Alabama[201] the court held that parol evidence was inadmissible to show that it was the intention to include grandchildren under the designation of "children."

§ 768. "Children" Does not Include Children of Wife by Former Marriage.—The designation by the insured of his wife and children as beneficiaries will not include her children by a prior husband.[202]

§ 769. "Children"—Where Children are Born Subsequent to the Issuance of the Certificate or Policy.—A certificate to a member of a mutual benefit society which designates his children as beneficiaries will include children born subsequent to the issuance of the certificate;[203] although in case of a regular policy of life insurance it is held that the policy vests in the children who are living at the time of the

[199] Hull v. Hull, 62 How. Pr. (N. Y.) 100. See Duvall v. Goodson, 79 Ky. 224.

[200] In re Conrad's Estate, 89 Iowa, 396; 56 N. W. Rep. 535.

[201] Russell v. Russell, 64 Ala. 500.

[202] Koehler v. Centennial Mut. L. Ins. Co., 66 Iowa, 325.

[203] Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703.

issuance of the policy, and children who are subsequently born will not be entitled to any share in the proceeds.[204]

§ 770. **"Children," When Includes Adopted Child—Release of Rights.**—If "children" are designated as the beneficiaries of a life insurance policy, an adopted child will share in the proceeds equally with the other children, where it is the apparent intent of the parties that such child should receive the benefit of the fund.[205] Although,[206] where the by-laws provided for the payment of benefits to children, it was held to be a question open to doubt whether an adopted child was included. And it was decided that the payment of a certain sum to such a child and the execution by her of an instrument releasing all claim against the estate would be binding, and would exclude her from any right to further distribution thereof.

§ 771. **"Children"—"His Children"—who Included Generally—Includes Child by Former Wife.**—A provision in a policy of life insurance designating as the beneficiaries "children of" B., the member, will not be void for uncertainty.[207] A life policy payable to children goes directly to the heirs, the money being part of decedent's estate, with which the executors have nothing to do.[208] If the policy or certificate provides that it shall be payable to insured's wife "and children," this will include a child of the insured by a former wife, who will be entitled to share with the other beneficiaries.[209] Where one procured a policy of insurance on his life payable to his wife, if living, otherwise to his children or their guardian, and the wife died, leaving children, and the insured had then paid all the premiums required by the policy, and afterward re-

[204] Connecticut M. L. Ins. Co. v. Baldwin, 15 R. I. 106; 23 Atl. Rep. 105; 14 Ins. L. J. 813. See sec. 771, herein. See Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221, as to children by subsequent wife.

[205] Martin v. Ætna L. Ins. Co., 73 Me. 25.

[206] Daniells v. Pratt, 143 Mass. 216; 10 N. E. Rep. 166.

[207] Brooklyn L. Ins. Co. v. Bledsoe, 52 Ala. 538.

[208] In re Guardianship of Hill's Heirs, 8 Wash. 330.

[209] Koehler v. Centennial M. L. Ins. Co., 66 Iowa, 325. See sec. 769, herein.

married and had another child, and surrendered the policy and took a paid-up policy for the benefit of the second wife, it was held that it was invalid as against his children, and that all the children by both marriages were entitled to a share.[210] And if a policy is for the benefit of the wife and children of the member, this will include a child who had left her father's house prior to his death, even though she was not dependent on him.[211] A covenant in a life policy issued by a New York corporation, and to take effect on being countersigned by the agent in Alabama, to pay a certain sum to the children of the insured "in conformity to the statute in such case made," will, it is held, be governed by the law of Alabama as to what persons come within the designation of "children."[212] If "children" be designated in a life policy, the interest vests at once in such as then meet the description, and is not divested in favor of survivors by death afterward.[213]

§ 772. **Children — "Their Children."** — If a policy of life insurance provides that it shall be payable to the wife of insured, or, if she does not survive him, then to "their children," only those children are included who are the children common to the assured and his wife.[214] And a child of the insured by a subsequent marriage will have no rights in or to the proceeds.[215] But in a case in Virginia, where A insured his life "for the benefit of his wife and their children," and he died, leaving a child by his first wife, and a second wife with children, it was held all were entitled to share in the proceeds of the policy.[216]

§ 773. **"Dependents."**—A frequent provision in the law under which a benefit society may be formed, or in the

[210] Ricker v. Charter Oak L. Ins. Co., 27 Minn. 93; 38 Am. Rep. 289.

[211] Jackman v. Nelson, 147 Mass. 300; 17 N. E. Rep. 529. See Proctor v. Proctor, 141 Mass. 165; 6 N. E. Rep. 849.

[212] Continental L. Ins. Co. v. Webb, 54 Ala. 688.

[213] So held in Hooker v. Sugg, 102 N. C. 115; 11 Am. St. Rep. 717.

[214] Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221; Evans v. Opperman, 76 Tex. 293; 13 S. W. Rep. 312.

[215] Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221; Evans v. Operman, 76 Tex. 293; 13 S. W. Rep. 312

[216] Stigler v. Stigler, 77 Va. 163.

charter or by-laws of the society or in the certificate, is one providing that the fund shall be payable to the member's family or dependents. No definite rule can be laid down applicable to all cases as to who are dependents. The meaning of that term must be governed by the particular facts of each case. It has been suggested that a person who receives aid and help from another, where that other person is under no moral or legal obligation to furnish aid, and who may at any time discontinue his help, is not a dependent, and will not receive the benefit of such a certificate. This would, however, be too broad a proposition as a general rule. There are many cases where persons receive aid and help from others who are under no obligation whatever to provide such help. All those who receive such aid in a greater or less degree could not certainly be included in the provision. But oftentimes a person may have no support other than that from some distant relative, who is poor and unable to provide for himself. In such a case the person receiving such aid ought to be a dependent with relation to such member. The following rule, however, seems to be a reasonable one, that is, that trivial or casual, or even wholly charitable, assistance—that is, support, maintenance, or assistance proceeding from the purely voluntary or charitable impulses or disposition of a member—does not ordinarily make one a dependent, as that word is generally used, under the statutes of organization, or other basis of the society's existence, and its by-laws or rules. There must be something more. There must be a reliance upon the member in some material degree for support, maintenance, or assistance resting on some moral, legal, or equitable grounds.[217] It has been held, under the circumstances of the case, that neither the member's betrothed, nor his sister,[218] nor his mother,[219] nor his creditor,[220] are dependents

[217] The rule as stated in McCarthy v. New England Ord. of Prot., 153 Mass. 318; 26 N. E. Rep. 868, per Morton, J., citing American Legion of Honor v. Perry, 140 Mass. 580; 5 N. E. Rep. 634; Ballou v. Gile, 50 Wis. 614; Bacon's Benefit Societies, sec. 261.

[218] American Legion of Honor v. Perry, 140 Mass. 580.

[219] Elsey v. Odd Fellows' Rel. Assn., 142 Mass. 224; 7 N. E. Rep. 844.

[220] Skillings v. Massachusetts B. Assn., 146 Mass. 217; 15 N. E. Rep. 566.

within the meaning of the provision. As we have already stated, the question whether a person is a dependent must depend upon the special circumstances of each case. Thus, a mother who is not a dependent under certain conditions may be dependent under different conditions, and in every case the particular facts of that case must determine who is and who is not a dependent.[221] Under a Wisconsin decision[222] the following facts appeared: When B. died he was a member in good standing of a society, one of whose objects was "to establish a widow and orphans' fund," from which, on decease of a member, a certain sum should be paid "to his family or those dependent on him, as he may direct." The rules provided for issuing to each member a benefit certificate, showing the "names of his family, or those dependent on him, to whom he desires his benefit paid"; that in case of his failure to direct "by will or benefit certificate" who shall receive benefits, "the council shall cause the same to be paid to the person or persons entitled thereto," and that "in case no person is entitled to the benefit, it shall revert to the widow and orphans' benefit fund." A benefit certificate issued to B., provided for payment of the money on his death to his infant children, and these died a short time before the father, and he gave no other direction, and left no children or descendants or other person dependent on him for support, except his widow; it was held that she was entitled to the benefit. The court in this case said: "We think the true meaning of the word 'dependent' in this construction means some person or persons dependent in some way upon the deceased, and as the proof shows that there was no other person so dependent upon the deceased except the widow, the money must be paid to her, and this especially so in a contest between the widow and the administrator of the deceased, who if he takes the money at all must take it for the creditors and the persons entitled to his estate by law, whether such person be of the family of the deceased, or dependent upon him or not."[223] In Pennsylvania, it is held that daughters of a mem-

[221] Carmichael v. Northwestern Mut. B. Assn., 51 Mich. 494; Supreme Lodge v. Nairn, 60 Mich. 44.

[222] Ballou v. Gile, 50 Wis. 614.

[223] Id. 619, per Taylor, J.

ber, though married and living apart from him, are legally dependent upon him, within the meaning of the rules requiring the beneficiaries to be persons of a member's family legally dependent upon him.[224]

§ **774. "Devisees."**—If a certificate issued by a mutual benefit society provides that the fund shall be payable to devisees of the insured, and the member dies leaving no will, the fund will be payable to his heirs.[225] In a case in the federal court,[226] however, it was held that the designation in the certificate payable to the "devisees of" decedent, where the general law under which the society was organized provided for the payment of the benefit to "widows, orphans, heirs, relatives, and devisees of deceased members," would prevent the heirs from receiving the fund where the member died intestate; and the designation of "devisees" was held to exclude all others from receiving the benefit of the fund.[227]

§ **775. "Devisees," or in Case of Their Prior Death, to "Legal Heirs or Devisees of Certificate Holder."**—If the benefit is made payable to the "devisees as provided in the last will and testament, or, in the event of their prior death, to the legal heirs or devisees of the certificate holder," the fund will be payable to the heirs of the insured if he dies having made no will.[228] And where a benefit certificate contained this provision, it was held that the society could be compelled by a suit in equity to levy an assessment, as they had agreed to do in the certificate, and to pay the proceeds to the heirs of the insured.[229] The court, per Sheldon, J., says in this case: "The certificate provides that upon proof of the certificate holder's

[224] Scholl v. Sadowry (Pa. C. P. 1894), 25 Pitts. Leg. Jour. 43.

[225] Newman v. Covenant Mut. Ins. Assn., 76 Iowa, 56; 1 Law Rep. 659.

[226] Worley v. Northwestern Mas. Aid Assn., 10 Fed. Rep. 227.

[227] Executor is not a devisee: Northwestern Masonic Aid Assn. v. Jones, 154 Pa. St. 99.

[228] Covenant Mut. B. Assn. v. Sears, 114 Ill. 108; 29 N. E. Rep. 480; Covenant Mut. B. Assn. v. Hoffman, 110 Ill. 603; Smith v. Covenant Mut. B. Soc., 24 Fed. Rep. 685.

[229] Covenant Mut. B. Assn. v. Sears, 114 Ill. 108, 29 N. E. Rep. 480.

death, an assessment shall be levied on the members for the full amount of the certificate. This implies that the money so raised is to be paid over to some one. . . . . The certificate appears to assume that there was a will and devisees under it, and so provides for payment to them, or, in the event of their prior death, to the heir of the certificate holder. It would seem to be a great violence to intention that the money should not be paid over, but that it should be held by and go to the association, while there were heirs to take it. The meaning evidently was, that the money should go to devisees; if there were no devisees to take it, then it should go to the heirs." [230]

§ 776. **"Estate"—"My Estate."**—A question arises where the proceeds of a benefit certificate or life policy are payable to the "estate" of the insured, whether the fund shall be subject to the claims of creditors. In the consideration of this point, the laws of the society, where it is a benefit certificate, the whole statute, contract, the constitution, etc., the terms of the certificate, and the intentions of the parties must be considered. In a Florida case[231] it was held that when one insured his life for the benefit of his "estate," his creditors had no interest in the policy. To enable creditors to take an interest to the exclusion of a wife or child it must appear from the policy that such was the intention. The Florida statute is explicit upon this point. The assignee in bankruptcy of the insured, he becoming a bankrupt during his lifetime, acquires no interest, nor does his administrator after his death.[232] In Massachusetts,[233] it has been held that the designation by a member of a mutual benefit society of his estate as beneficiary is invalid, where the statute under which the society is organized provides for the payment of benefits to the "widows, orphans, or other dependents of deceased members."[234] In a case in New York,[235] where the policy was made payable to "the

[230] Id. 112, 113.
[231] Pace v. Pace, 19 Fla. 438.
[232] See Glanz v. Gloechler, 10 Ill. App. 484.
[233] Daniels v. Pratt, 143 Mass. 216; 10 N. E. Rep. 166.
[234] See Basye v. Adams, 81 Ky. 371.
[235] Clinton v. Hope Ins. Co., 45 N. Y. 461.

estate of" the insured, the court said: "Without entering into any elaborate discussion of the subject, we will simptly state that the cases having a bearing upon the subject[236] show that these and similar terms under the circumstances of the case are so interpreted as to benefit the surviving members of the family, rather than for the benefit of the creditor or administrator." In this case the administrator told the agent of the company that he desired the insurance for the benefit of his widow and heirs, but the policy was made payable to the "estate of" the insured. If there were no provision in the charter or by-laws of a society as to the classes from which the beneficiary must be chosen, and nothing in the statute law upon this point, and there was nothing indicating an intention on the part of the member or of the insured, under a regular life policy, to refer to some certain person or class of persons by such a designation, then it would seem that there was an intention to make the fund payable to his personal representatives, and to render it assets to his estate.

§ **777. "Executor."**—Where the by-laws of a Massachusetts mutual benefit association provide that when a member dies leaving no widow, child, mother, or father, payment shall be made to his executor, etc., the executor of a deceased testate member holds the fund, not as general assets of the estate or for disposition, according to the will, but for distribution according to the rules established by the statute of distribution; the laws of Massachusetts regulating such corporations limiting beneficiaries to relatives of the members.[237] Although a life policy is payable to the executor or administrator of assured, nevertheless the heirs and legatees take free from liability for debts, under the Mississippi code, in a sum not exceeding five thousand dollars.[238]

§ **778. "Executors and Administrators."**—In Massachusetts a statute authorized a benefit society to issue a certificate

[236] Myers v. John Hancock Ins. Co., 41 Mo. 538.

[237] Daniels v. Pratt, 143 Mass. 216; 10 N. E. Rep. 166.

[238] Coates v. Worthy, 72 Miss. 575; 17 S. Rep. 606; Code Miss. 1892, sec. 1932.

to a member for his own benefit. Where such a certificate was issued, and it provided that upon the death of the member the proceeds should be paid to the "executor or administrator of said member," "in trust, however, for or to be forthwith paid over to his heirs at law," it was held that the proceeds of the certificate formed a part of the member's estate, and were to be disposed of in accordance with his will.[239]

§ **779. "Family" as Beneficiary.**—It is a frequent provision in the charter or by-laws of a mutual benefit society that the fund shall be payable to the member's family. It is difficult, however, to state definitely what constitutes a family, as that word is used in this connection. As stated under a prior section,[240] the language used in designating a beneficiary in associations of the class under consideration is construed, so far as applicable, by the rules governing the interpretation of wills which speak from the testator's death, differing from a regular life policy in this respect, that in the latter the beneficiary's rights become vested on the completion of the contract and issuance of the policy, and therefore in a life policy the persons who constituted the family at that time, and perhaps at the time of the application, must be deemed to have been those intended to be benefited, but where the "family" is designated under a certificate in an association of the class first above mentioned, a question arises whether the survivor of such family would not take, and this has been so held in New York.[241] If, then, the rules governing the interpretation of wills apply, the term "family" ought to be given a very comprehensive meaning, but the whole contract should, however, be construed together, especially where the statute of incorporation uses other words in connection therewith.[242] Where the charter of such a society provided for the payment of a certain sum to the

[239] Harding v. Littleball, 150 Mass. 100.

[240] Sec. 738, herein.

[241] Brooklyn Masonic Rel. Assn. v. Hanson, 53 Hun (N. Y.), 149.

[242] See Carmichael v. Northwestern Mut. B. Assn., 51 Mich. 494. For definition of "family," see Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 150, per Lotz, J.; Phillips v. Ferguson, 85 Va. 509; 17 Am. St. Rep. 78; Lane v. Phillips, 69 Tex. 240; 5 Am. St. Rep. 41; Moyer v. Drummond, 32 S. C. 165; 17 Am. St. Rep. 850.

member's "family" or appointee, and "in case no direction is made by a brother, the same shall be paid to the person or persons entitled thereto," it was held that on failure to appoint, the sum should be paid to the member's wife and children, rather than to his administrator.[243] Under a provision in the charter of a society that the fund should be for the benefit of the member's "family" and should be free from the claims of all creditors of the deceased member, a certificate which is payable to the widow of the member will be for the benefit of the family of the member, and exempt from seizure by the member's creditors.[244] It has been held where a young lady has lived for seven years in the same home with the member, an old man, and their mutual relations have been the same as those of father and daughter, that she will be included within the term "family." [245] So a widow who occupies the home with infant children constitute the "family." [246] The courts, however, will not construe the word so as to encourage illicit relations, and include a mistress within the term "family."[247]

§ 780. "Families, Widows, Orphans, or Other Dependents."—A provision that the fund shall be payable to the "families, widows, orphans, or other dependents" of the member, is not to be construed as meaning that the relatives designated must all be dependent upon such person. The words "or other dependents" are not to be construed as limiting the preceding words, "families, widows, orphans," so that only those who are of this class, and who are dependent upon the member, will share in the fund. The words "other dependents" mean those outside of the family, his widow, or orphans, who may have been dependent for their support upon the insured. "Any other construction would require the court, in each case, to enter into an investigation of the fact of how far the widow and orphans, or any other member of the family,

[243] Fenn v. Lewis, 81 Mo. 259; 10 Mo. App. 478. See, also, Ballou v. Gile, 50 Wis. 614.

[244] Schillinger v. Boes (Ky.), 3 S. W. Rep. 427.

[245] Carmichael v. Northwestern Mut. B. Assn., 51 Mich. 494.

[246] Leaf v. Leaf, 92 Ky. 166; 17 S. W. Rep. 354.

[247] Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 544.

was self-supporting, which in itself, instead of furthering the objects of these associations, would soon encompass their complete destruction."[248] If it appears from the charter, rules of association, and a circular issued by the society that the fund is to be payable to the family, or one dependent upon the member, the beneficiary must be a member of the family or a dependent.[249] If a benefit certificate payable to the wife of the member is issued by an association whose charter designates the class of beneficiaries as the "family, orphans, and dependents," an attempted subsequent designation of a person not of that class will be ineffectual, so as to defeat the rights of the wife under the certificate.[250]

§ **781. "Friends."**—A designation of a member of a mutual benefit society of "friends" as beneficiaries has been held not a valid designation.[251] In a Michigan case,[252] where it appeared that the beneficiary was in no way related to the insured, and had been described in the certificate as a "friend" of the member, and the statute under which the society was organized provided for the organization of societies to secure benefits "to the family or heirs of any member," it was held that the society might set up the want of insurable interest in the beneficiary, in defense of an action on the policy. We have, however, more fully considered this question elsewhere.[253]

§ **782. "Guardian."**—A provision in a policy of insurance that payment shall be made to the "guardians" of the insured's children, means the legally qualified guardian;[254] and payment to the guardian ad litem will discharge the insurers.[255] So payment by a corporation of the state to the testamentary

[248] Grand Lodge v. Elsner, 26 Wis. App. 116.

[249] Caudell v. Woodward, 96 Ky. 646; 29 S. W. Rep. 614.

[250] Di Messiah v. Geru (N. Y. C. & C. C. P. 1894), 63 N. Y. St. Rep. 172; 30 N. Y. Supp. 824.

[251] Rindge v. Northeastern Mut. Aid Soc., 146 Mass. 286.

[252] Mutual B. Assn. v. Hoyt, 46 Mich. 473.

[253] See sec. 1071, herein.

[254] Winesthoff v. Germania L. Ins. Co. (N. Y.), 14 N. E. Rep. 811; 3 N. Y. (L. ed.) 620; 10 Cent. Rep. 500.

[255] Winesthoff v. Germania L. Ins. Co., 14 N. E. Rep. 811; 3 N. Y. (L. ed.) 620.

guardian in another state, who has not complied with the statute of that state as to the giving of a bond, will be ineffectual against infant beneficiaries.[256] A life insurance policy payable to the widow of the insured, half in her own right and half for the use of her children, and which directs that the wife shall act as guardian without giving security, is collectible by the widow alone.[257]

§ **783. "Heirs"—"Lawful Heirs"—"Legal Heirs."**—In policies of life insurance, and in mutual benefit certificates, the insured frequently designates his "heirs" or "lawful heirs" or "legal heirs" as the beneficiaries, without naming any person to whom the proceeds shall be payable. And in many cases statutes under which a benefit society is organized, or the laws of the society, provide that payment shall be made to the heirs of the member, in case the latter dies intestate. These several phrases are generally construed as if synonymous. Questions as to who are included by such terms have often arisen in the construction of wills. We shall, however, in this section only consider those decisions where the point has arisen in actions on insurance policies or benefit certificates. In the absence of any statute changing the common-law rule, that rule would prevail, and the word "heirs" would be construed with reference to the general meaning of that term. There are, however, in several states statutes of distribution which declare that the personalty shall be distributed among certain persons, and the statute which controls in any case must necessarily be considered. Under such statutory enactments the point arises whether the proceeds of a life insurance policy or a mutual benefit certificate shall be payable to the next of kin, or shall go to those entitled to the personalty. This question has generally been before the courts where the widow of the insured has claimed a share in the fund, upon the ground that she is entitled, under the statute, to a certain part of the personalty, and that while this fund is not part of the personal

[256] Winesthoff v. Germania L. Ins. Co., 14 N. E. Rep. 811; 3 N. Y. (L. ed.) 620.

[257] Piedmont & L. Ins. Co. v. Ray, 50 Tex. 511.

estate of the insured, it is nevertheless personal property, and subject to distribution under the statute. The decisions, however, are certainly not sufficiently in harmony to establish any definite rule of law. In Connecticut, it is held that a Massachusetts benefit association certificate issued to a resident of that state, the contract there to be performed, is to be construed by its laws; and where such a certificate is payable to the "heirs at law" of the member, the Massachusetts statute of distribution controls as to the proportions each person shall receive, the widow being included as an "heir at law."[258] In Georgia, the word "heirs" in a life policy payable to "heirs and assigns" means next of kin, there being no widow or child of the member surviving.[259] In Illinois,[260] the court, in construing the phrase "legal heirs," held that it meant only the next of kin, and excluded the widow of the insured from any share of the proceeds. In a later case in the same state,[261] under the following provision of the statute,[262] that "when there is a widow or surviving husband, and no child or children, of the intestate then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow and surviving husband, as an absolute estate forever, and the other half of the real estate shall descend as in other cases where there is no child or children, or descendants of a child or children," it was held that where a benefit certificate is made payable to the "devisees or heirs at law" of the insured, the widow will, in case her husband dies intestate leaving no children, be entitled to the whole amount of the certificate. In another decision in that state,[263] where the certificate provided that in case of the death of the beneficiaries named, the fund should be payable to the "legal heirs or devisees of the holder of the certificate," it was held that the widow and four children were the heirs of the holder and entitled to the fund. In

[258] Mullen v. Reed, 64 Conn. 240; 29 Atl. Rep. 478.

[259] Hubbard v. Turner, 93 Ga. 752; 20 S. E. Rep. 640.

[260] Gauch v. St. Louis M. L. Ins. Co., 88 Ill. 251.

[261] Alexander v. Northwestern Masonic Aid Assn. (Ill. 1888), 18 N. E. Rep. 556.

[262] Stat. of Ill., c. 39, sec. 1.

[263] Covenant Mut. B. Assn. v. Hoffman, 110 Ill. 603.

Indiana, where a person died, leaving a third wife and eleven children, it was held that the proceeds of a life insurance policy payable to his legal heirs should be divided into twelve equal parts, the widow taking one and each child one.[264] In Iowa, it is held that the widow is not entitled to any share of the proceeds of a policy of insurance upon her husband's life which is payable to his "legal heirs."[265] In Michigan, the word "heirs" may include children of a deceased brother of the member, even though they have no insurable interest, where the policy is payable to the "wife, heirs," etc., of the member.[266] It is also held in that state that the term "heirs at law" will include a widow, where she is, under the statute, the distributee of her husband's personal estate.[267] In Massachusetts,[268] in a case where the by-laws provided that "if the designator leave no widow or children or assignee, then it shall be payable to his heirs," it was held that the word "heirs" was used in its limited sense, as applied to those who would be heirs at the time of designation. In another case in the same state[269] the following facts appeared. The charter limited the beneficiaries to the

[264] Wilburn v. Wilburn, 83 Ind. 55.

[265] Phillips v. Carpenter, 79 Iowa, 600; 44 N. W. Rep. 898.

[266] Silvers v. Michigan Mut. B. Assn., 94 Mich. 39.

[267] Lyons v. Yerex, 100 Mich. 214; 58 N. W. Rep. 1112; 23 Ins. L. J. 639. As to the meaning of the words "heirs," "legal heirs," "legal representatives," the court, per McGrath, C. J., considers and cites Hascall v. Cox, 49 Mich. 440; Tillman v. Davis, 95 N. Y. 17; Griswold v. Sawyer, 125 N. Y. 411; Kaiser v. Kaiser, 13 Daly (N. Y.), 522; Lawwill v. Lawwill, 29 Ill. App. 643; Association v. Hoffman, 110 Ill. 603; Alexander v. Association, 126 Ill. 558; Johnson v. Knights of Honor, 53 Ark. 255, 260, per Battle, J.; Niblack's Mutual Benefit Societies, secs. 247, 248; and cites Bailey v. Bailey, 25 Mich. 185; Barnett v. Powers, 40 Mich. 317; Richardson v. Martin, 55 N. H. 45; Ivin's Appeal, 106 Pa. St. 176; Luce v. Dunham, 69 N. Y. 36; Dodge's Appeal, 106 Pa. St. 216; and refers to Houghton v. Kendall, 7 Allen (Mass.), 72; White v. Stanfield, 146 Mass. 424; Addison v. Association, 144 Mass. 591; Collier v. Collier, 3 Ohio St. 369; Eby's Appeal, 84 Pa. St. 241; Freeman v. Knight, 2 Ired. Eq. (N. C.) 72; Insurance Co. v. Miller, 13 Bush (Ky.), 489; Wilburn v. Wilburn, 83 Ind. 55; Gesling v. Caldwell, 1 Lea (Tenn.), 454; Ward v. Saunders, 3 Sneed (Tenn.), 387; Croom v. Herring, 4 Hawks (N. C.), 393.

[268] Elsey v. Odd Fellows' etc. Assn., 142 Mass. 224.

[269] Addison v. New England Com. Trav. Assn., 144 Mass. 591; 12 N. E. Rep. 407.

widow or children of the deceased, or to those dependent upon him. The member in his application, in response to the question as to whom the fund should be payable, replied, "to my heirs." In response to the further question that applicant state the relationship of the person to whom he wished the fund paid, he answered "wife or daughter." It was held that under any aspect of the case the money must be paid to the widow, since if the designation was a valid one she was entitled to the fund, and if it was not, she was entitled to it also under the charter. It will be observed in this case that if the designation was a valid one, the member had indicated by his answers, whom he meant by the phrase "my heirs." Again, in the same state,[270] where the laws provided that in case all the beneficiaries named in a benefit certificate died, the money should be paid to the heir of the insured, it was held that the administratrix of the insured might maintain an action on the certificate. In Minnesota, where the by-laws of a society, organized "to aid and assist the widows and orphans of deceased members," provided for the designation of beneficiary, and that, in case no beneficiary was designated in the manner prescribed by the by-laws, then the fund should be payable to the heirs or devisees of said member, it was held that the widow was an heir within the meaning of the by-laws.[271] In New Jersey, the term "legal heirs" will include next of kin dependent upon the member at the time of his death, where the by-laws direct that in case no disposition shall have been made of the benefit, it shall be paid to his legal heirs dependent on him.[272] It is also held in the same state that "heirs" means the persons entitled under the statute of distributions to the surplus of the personal estate and includes the widow and children.[273] In New York,[274] it is held that the phrase "lawful heirs" may include the widow of the

[270] Burns v. Grand Lodge, 153 Mass. 173; 26 N. E. Rep. 443.

[271] Hanson v. Minnesota S. C. R. Assn., 59 Minn. 123; 60 N. W. Rep. 1091.

[272] Britton v. Supreme Council, 46 N. J. Eq. 102; 19 Am. St. Rep. 376.

[273] Leavitt v. Dunn, 56 N. J. L. 309; 28 Atl. Rep. 590.

[274] Hannigan v. Ingraham, 55 Hun (N. Y.), 257; cited in Walsh v. Walsh, 66 Hun (N. Y.), 297; 49 N. Y. St. Rep. 237; 20 N. Y. Supp. 933; affirmed without opinion, 143 N. Y. 662, which held that "legal

insured. In a case which arose in Ohio[275] it was held that under the designation "his heirs," in a benefit certificate, the widow would be entitled to the fund, where the insured died leaving no children surviving him, though there were brothers and sisters. In Tennessee,[276] in a case where the certificate was payable to the "legal heirs," it was held that the fund should be distributed under the statutes of distribution, and that those who were entitled to the personal estate under the statute were the proper beneficiaries of the fund. In Texas,[277] it is held that the word "heirs" in the policy entitles to the fund parties proving heirship, as against creditors, and it was said that a policy payable to "heirs" is a policy for their benefit, unless there is something on its face to show a different intention.[278] And in another case in the same state it is held that "heirs" has reference to those entitled as such under the statute, where not otherwise limited,[279] and that the term "heirs," under a policy making benefits payable to the member's "mother or his lawful heirs," will include the widow and minor child of insured.[280] In another case,[281] where a member of a benevolent society procured a benefit certificate payable to "legal heirs," and subsequently to its issuance his wife died, leaving two children, and he thereafter married, it was held that upon his death his two children by his first wife, there being none by the second, were entitled to the whole fund, and that the phrase "legal heirs" did not include the second wife. From these cases it will be seen that no rule can be laid down which will be applicable to all cases. Some cases may be determined by the common-law rule as to heirs in those states where the common-law

heirs" meant the persons who would take such property in case of intestacy, and not the next of kin; citing, also, Bishop v. Grand Lodge E. O. of M. A., 112 N. Y. 627; Lawton v. Corliss, 127 N. Y. 100; Heath v. Hewitt, 127 N. Y. 166; Griswold v. Sawyer, 125 N. Y. 411; Woodward v. James, 115 N. Y. 346; Brooklyn Mas. Rel. Assn. v. Hanson, 53 Hun (N. Y.), 149.

[275] Jamieson v. Knights Templar Assn., 12 Week. Law Bull. 272.

[276] Gosling v. Caldwell, 69 Tenn. 454.

[277] Mullins v. Thompson, 51 Tex. 7.

[278] Id., 13, per Gould, J.

[279] Hanna v. Hanna (Tex. C. C. A. 1895), 30 S. W. Rep. 820

[280] Hanna v. Hanna (Tex. C. C. A. 1895), 30 S. W. Rep. 820.

[281] Mearns v. Ancient O. U. W., 22 Ont. Rep. 34.

rule prevails. In those states where statutes provide for distribution of the personalty, the cases conflict as to whether the fund will go to next of kin or be distributed in accordance with the statute. In many instances it may be possible to gather from the words of an application, or from some qualifying phrase in connection with the word "heirs," what persons the insured intended by the designation. In deciding this question, not only is it necessary to consider the laws of the state as to distribution, but also the law, under which a society is organized, as well as the statute of incorporation, charter, by-laws, and rules of the organization; also the apparent meaning of the insured by the use of the term "heirs," where such meaning can be arrived at by the rules of construction, reference being had to the rules governing the interpretation of wills, where the claim is under a benefit certificate and is not a regular life policy.

§ **784. "Heirs or Assigns."**—If a policy of life insurance is payable to the "heirs or assigns," and is never assigned, the heirs of the insured will be entitled to the proceeds. Such a policy will not form any part of the estate for the payment of the assured's creditors.[282] The term "heirs," in a policy payable to "heirs and assigns," means next of kin, under the statute of distributions in Georgia, but their interest is derived under the contract alone, and they take as purchasers, and not as heirs and distibutees, so that the creditors are not entitled to claim the proceeds as part of the estate, in the absence of actual or constructive fraud in taking out and keeping up the policy. In case there has been such fraud, the money invested in the policy which ought to have been applied on their demands may be followed in equity and reclaimed.[283]

§ **785. Heir—Husband as Heir.**—In California, if the wife, her executors, and assigns are the payees under a life policy on the husband's life, it is her separate property, and if he survives her, he is her heir, without regard to the fact that

[282] Mullins v. Thompson, 51 Tex. 7.
[283] Hubbard v. Turner, 93 Ga. 752; 20 S. E. Rep. 640.

there is no administration on her estate until after his death.[284]

§ 786. **"Heirs and Legal Representatives"—"Heirs or Representatives"**—The phrase "heirs and legal representatives," as applied to personal property, has been construed as meaning the next of kin to be determined by the intestate laws, and will include decedent's father and mother, and the fund is no part of his estate to which the administrator is entitled for assets for creditors.[285] But the words "heirs or representatives" make the policy payable to the administrator as assets of the insured's estate.[286]

§ 787. **"Himself, Executors," etc.**—A life policy issued to one for the benefit of himself, executors, etc., becomes upon his death a part of his estate, like any other chose in action.[287] Under the endowment laws and constitution of the Knights of Maccabees, the heirs of a member who has procured a certificate payable to himself may collect the proceeds.[288]

§ 788. **Infant as Beneficiary.**—Under the Ontario statutes,[289] money which is payable to infants under a policy of life insurance may, where there is no guardian or trustee appointed, be paid to the executors of the will of the insured, without security being given by them, and such payment will discharge the company.[290]

§ 789. **"Natural Heir."**—Though a certificate issued by a mutual benefit society may be conditioned to be void if the beneficiary is not a "natural heir" of the member, yet if the society, with knowledge of the fact that the beneficiary is not a

[284] In re Dobbel's Estate, 104 Cal. 432; 38 Pac. Rep. 87.

[285] Hodge's Appeal, 8 Week. Not. Cas. (Pa.) 209.

[286] Wason v. Colburn, 99 Mass. 342.

[287] Burton v. Farenholt, 86 N. C. 260.

[288] Peet v. Great Camp of K. of Mac., 83 Mich. 92; 47 N. W. Rep. 119. In this case the administrator was sole heir: Citing Aveling v. Association, 72 Mich. 7.

[289] Secs. 11 and 12, Rev. Stat. Ont., c. 136.

[290] Dodds v. Ancient O. U. W., 25 Ont. Rep. 570; 14 Can. L. T. 444.

"natural heir," continues to treat the contract as a valid existing contract, the provision will be waived. This was so held where the certificate contained such a provision, and the society, after knowledge of the fact that the beneficiary was not a "natural heir," continued to collect assessments.[291]

§ **790. "Orphans."**—Where the word "orphans" is used in the charter or by-laws of a society, the meaning of the word may often be ascertained from other provisions therein. The construction of this word came before the court in Missouri, upon the point whether it would include adults who had lost their father, and it was held that, from a consideration of the rules and by-laws of the society, the words "orphan children" must be confined to the minor children.[292] And in many cases the meaning of the word may perhaps be thus ascertained. We think that as a general rule, however, in benefit societies the word "orphans" or "orphan children" will include the children, both adults and minors, who have lost their father, without regard to the fact whether the mother is living or not. Where a charter of a benefit association declares its purpose to be to assist the widows and "orphans" of deceased members, and the insured may under the constitution designate the person to whom the fund shall be payable, the designation by the insured of a daughter of his wife by a former husband is valid.[293]

§ **791. Partnership as Beneficiary.**—Where a person indebted to a firm obtains a benefit certificate intended by all of the parties to the transaction to be for the benefit of the firm, but made payable to one of the members thereof, the fact that the nominal beneficiary dies before the insured will not defeat the right of the firm to recover as against the heirs of the insured.[294]

[291] Lindsey v. Western Mut. Aid Soc., 84 Iowa, 734; 50 N. W. Rep. 29.

[292] Hammerstein v. Parsons, 29 Mo. App. 509.

[293] Renner v. Supreme Lodge (Wis. 1895), 62 N. W. Rep. 80.

[294] Adams v. Grand Lodge A. O. U. W., 105 Cal. 321; 38 Pac. Rep. 914.

§ 792. **"Relatives"—"Related to."**—Unless the charter of a mutual benefit society forbids, the society may specify in their by-laws what relatives shall be entitled to the fund, in the absence of any designation by the member.[295] It has been held in Massachusetts,[296] in a case involving the construction of the word "relative" in a statute, that a step-son is not a relative. In Iowa, however,[297] where the statute provided that no corporation or association organized or operating under this act shall issue any certificate of membership or policy to any person . . . . unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured members," it was held a step-son was a relative, and after his own mother's death was entitled to recover on the certificate. In a case in New Jersey,[298] involving the construction of the phrase "related to," as used in the by-laws of a benefit association, it was held that the wife of a member's grand-nephew, though not related to the member by blood, was included in the phrase. Where the insured member and person named as beneficiary agreed to act toward each other as uncle and niece, it was held that this would not constitute the person named as beneficiary a relative within the meaning of the statute providing that only "relatives" of members could be beneficiaries.[299] A relative by affinity selected by the member is entitled to the fund as a person "related to and dependent upon him."[300]

§ 793. **"Representatives"—"Legal Representative."** In the construction of the words "representatives," used in a regular life policy, the intention of the insured in using the term is essential in determining its meaning. Thus, where a

[295] Addison v. New England etc. Assn., 144 Mass. 591; 12 N. E. Rep. 507.

[296] Kimball v. Story, 108 Mass. 382.

[297] Simcoke v. Grand Lodge A. O. U. W., 84 Iowa, 383; 51 N. W. Rep. 8; 15 L. R. Annot. 114.

[298] Bennett v. Van Riper, 47 N. J. Eq. 563; 22 Atl. Rep. 1055; 45 Alb. L. J. 4; reversing 19 Atl. Rep. 785.

[299] Supreme Council American Legion of Honor v. Green, 71 Md. 263.

[300] Bennett v. Van Riper, 47 N. J. Eq. 563; 24 Am. St. Rep. 416.

policy of life insurance was made payable, in case of the decease of the assured, to his heirs or "representatives," it was held that in the construction of the policy the intent of the assured must govern, and that if it appeared from the context that his intention was to make provision for his family, rather than to bestow the money upon his executors or administrators, to be administered upon as ordinary assets, the word "representatives" would be construed to mean heirs, or next of kin.[301] If the term "legal representative" is used in the charter and by-laws of a society, its meaning may be limited by the use of other clauses or provisions. Thus, where a charter of a society provides for the payment of benefits to the widow, orphans, heirs, assignees, or legatee of a deceased member, and the by-laws provide that in case the member has no legal representatives such amount as they would have been entitled to should become the property of the association, it was held that the phrase "legal representatives" referred to those who were legal representatives within the meaning of the provision, "widow, orphan, heir, assignee, or legatee," in the charter, and was restricted to them.[302] If the term "representative" is used in the statute of incorporation and articles of association of a society, its meaning, not being limited by the statute, articles of association, or by-laws, it should not be construed in a limited or technical sense, but will include such person as the member may designate, and in case of a failure to designate, then the by-laws may be resorted to to determine who will take. Thus, where the by-laws provide for the payment of benefits to the widow, heirs, or designated beneficiary of a deceased member, and also provide that in case of his death the amount shall be paid (1) to his widow; (2) if no widow, to his children; (3) if no children, to his mother; (4) if no mother, to his father; (5) if no father, then to his legal heirs; and (6) in default of all these, and in case of no designated beneficiary, the money to revert to the society, it was held that the term "representatives" must be construed as meaning and including any person whom the member might designate, and if he should fail to designate,

[301] Loos v. John Hancock etc. Ins. Co., 41 Mo. 538.

[302] Masonic M. R. Assn. v. McAuley, 2 Mackey (D. C.), 70.

then the person whom the by-laws designated as the one to whom the money should be payable would take.[303] It is held that the words "legal representatives" give a right of action to the administrator alone.[304] But where an application for a policy declares it to be for the benefit of the "legal representatives," and the policy provides "that the amount shall be payable to and for the sole use of his legal representatives," and the by-laws declare that the "object of this company shall be to insure its members and to secure pecuniary benefits to widows, orphans, families, or heirs of deceased members," the words "legal representatives" will it is held be construed as meaning heirs or next of kin, and not the executors or administrators, and therefore the heirs are the beneficiaries, and, it is held, include the widow.[305] In ascertaining the meaning of the term "legal representatives," the intention of the parties is the important factor and the meaning of the words must be ascertained, in view of the subject matter and the attendant circumstances, if possible. Where a policy was made payable to "the legal representatives" of the insured, the court held that, under the circumstances, it should be payable to the wife and children.[306] In New York the term "legal representatives," where the right of the assured to chose his beneficiary is unrestricted, as in case the by-laws state the objects of the society to be for aid to families of members "or assigns," is not limited to the widow to the exclusion of distant relatives, no children having survived.[307] Under a provision in the charter that the fund shall be payable to "legal representatives" of the insured, and a provision in the by-laws specifies that in case of a failure to designate a beneficiary the fund shall be payable to the member's "legal representatives," it is held that if a person designates a beneficiary under a mutual benefit certificate, and the benefi-

[303] Walter v. Hensel, 42 Minn. 204; 44 N. W. Rep. 57.

[304] Sulz v. Mutual Res. Fund L. Assn., 145 N. Y. 563; 65 N. Y. St. Rep. 513.

[305] Schultz v. Citizens' Mut. L. Ins. Co., 59 Minn. 308; 61 N. W. Rep. 331.

[306] Griswold v. Sawyer, 125 N. Y. 411; 35 N. Y. St. Rep. 396; 26 N. E. Rep. 464.

[307] Sulz v. Mutual Res. Fund L. Assn., 145 N. Y. 563; 65 N. Y. St. Rep. 513.

ciary dies before the member, the fund will be payable to the legal representatives of the member, and not to those of the beneficiary.[308] In Tennessee, a policy payable to "legal representatives" goes to the widow and next of kin under the statute,[309] to the exclusion of creditors, for the executor and administrator acquire no beneficial interest in the recovery of the fund.[310]

§ **794. "Resident Brother" as Beneficiary.**—"Resident brother" has not reference to a member's legal residence, but is intended to designate one who at the time of his claiming benefits is within the jurisdiction of the tribe.[311]

§ **795. Son as Beneficiary.**—It is held in New York that the contract is with the son in his own name and for his own benefit, under a policy on his father's life, upon an application signed by both, the policy being payable to "assured" after the death of the "insured." [312]

§ **796. "Survivor."**—If two persons are designated as beneficiaries in a benefit certificate, which provides that, "in case of the death of either, full amount is to go to the survivor . . . . if living; if not living, to the heirs of said member," the fund is vested in the two beneficiaries, and upon the death of the member, and in case one of them subsequently dies prior to the payment of the benefit, his share will go to the executor, and not to the survivor.[313] It has been held in Kentucky[314] that if two or more persons are insured as beneficiaries in a regular life policy, and subsequently one of them dies, his interest will vest in the survivor or survivors. This does not, however,

[308] Expressman's Aid Soc. v. Lewis, 9 Mo. App. 412. See section in this chapter on death of beneficiary.

[309] Mill & V. Code, secs. 3135, 3335.

[310] Rose v. Wortham, 95 Tenn. 505; 32 S. W. Rep. 458.

[311] Walsh v. Cosumnes Tribe, I. O. of R. M., 108 Cal. 496, 500; 41 Pac. Rep. 418.

[312] Cyrenius v. Mutual L. Ins. Co., 145 N. Y. 576; 65 N. Y. St. Rep. 520; 40 N. E. Rep. 225.

[313] Union Mut. Assn. etc. v. Montgomery, 70 Mich. 587; 38 N. W. Rep. 588; 14 Week. Rep. 877.

[314] Robinson v. Duvall, 79 Ky. 83.

seem to be in conformity with the doctrine of vested interest which controls in regular life policies, for, as a general rule, the interest of the beneficiaries under a regular life policy is a vested one, and consequently it would follow that upon the death of one of the beneficiaries, where several are named, his interest ought to go to the persons entitled to claim under the deceased beneficiary, unless the intention of the insured is clearly and unequivocally expressed otherwise.[315]

§ **797. "Trustees"—"In Trust."**—If a person procures a policy of insurance, and signs the application as trustee for his children, and it is so designated in the policy, the children will have a vested interest therein, which cannot be defeated by a surrender of the policy, and the procuring of a new one which is a mere continuation of the first. In such case, the children will be entitled to the proceeds of the second policy.[316] A member who has designated his wife as beneficiary may surrender the certificate and procure another payable to her in trust for herself and children, and this will constitute no fraud upon the wife's creditors since she has no vested rights in the certificate.[317] A person who has procured a policy of life insurance payable to his wife, in trust for her and her children, may subsequently, while insolvent, surrender said policy with her consent, and procure a paid-up policy payable to her, and this will not be presumed to be in fraud of his creditors.[318] An agreement by a married woman to whom a policy of insurance on her husband's life has been assigned, that upon his death half of the proceeds shall be held in trust for her daughter, does not, by reason of her coverture, bar her right to the recovery of the whole amount of the policy.[319]

§ **798. "Widow and Children"—Proceeds Paid to Administrator—Extent of His Liability.**—Where a policy of

[315] See Wilburn v. Wilburn, 83 Ind. 55.

[316] Garner v. Germania L. Ins. Co., 110 N. Y. 266; 1 L. R. Annot. 256. It is said in Robinson v. Duvall, 79 Ky. 83, that the renewal of the certificate is, in a certain sense, a new contract.

[317] Schillinger v. Boes, 85 Ky. 357; 3 S. W. Rep. 427.

[318] Foster v. Brown, 65 Ind. 234.

[319] Love v. Love, 5 Pa. (L. ed.) 334; 11 Cent. Rep. 410.

life insurance, expressed under the Massachusetts statute to be for the benefit of the widow and children of assured, is made payable upon his death to his administrator, the administrator is liable to a surviving child for the child's share of the amount of the policy collected by him from the insurers as for money had for the child's use. But he may deduct from such amount his expenses of collecting the same, which may include the expenses of taking out administration in Massachusetts, if this is the only estate of the deceased in that commonwealth.[320]

§ 799. "Widow and Children"—Proceeds Paid to Administrator of Insured a Trust for Widow and Children. Where a policy of life insurance expressed to be for the benefit of the widow and children of the assured is made payable upon his death to his administrator, the amount of such insurance is not general assets when it comes into the hands of the administrator, and is not liable to the payment of debts, or to distribution under the will of the deceased or the law of his domicile. It is a trust, and the trustee has no duty with respect to the money, but to immediately pay it over to the cestuis que trust.[321]

§ 800. "Widow and Children"—Afterward in Order Named.—Under a provision in the charter of a mutual benefit society that the fund to which the member's family is entitled shall be paid as may be designated in the application for membership, and this being rendered impossible it shall go first to the "widow and infant children" and afterward in the order named, the fund will be paid to the widow, where the member directs that the benefit be paid as he may designate in his will, and he dies intestate leaving no children.[322]

§ 801. "Widow, Orphans, or "Heirs."—Where the charter or by-laws provide that in case the member designates no beneficiary the fund shall be payable to the "widows, orphans, or heirs" of a deceased member, the provision will be construed

[320] Gould v. Emerson, 99 Mass. 154; 96 Am. Dec. 720.
[321] Gould v. Emerson, 99 Mass. 154; 96 Am. Dec. 720.
[322] Whitehurst v. Whitehurst, 83 Va. 153; 1 S. E. Rep. 801.

as making the fund payable first to the widow, if there be one, and if not, then to the orphan, and so on. In other words, it will be construed the same as if the provision read, "first the widow and then to the orphans or heirs, in the order named."[323] In some cases, the phrase "in the order named" is inserted after the clause designating the classes.[324]

§ 802. "Widows, Orphans, and Heirs or Devisees.—A provision in the charter or by-laws of a society stating that the object of the society is to aid the "widows, orphans, and heirs or devisees of the deceased member," will not necessarily prevent the member from designating some person as beneficiary who is not among the members of his own family.[325]

§ 803. "Widow or Relatives"—Funeral Benefit.—In cases of this character the objects and purposes of the benefit are important, and the courts will give them the effect contemplated by the provisions relating thereto. Thus, if the by laws of a benefit society provide for the payment of a certain sum to the "widow or relatives" of the member, which fund is merely for the purpose of providing a decent burial, the widow will not be entitled to the benefit of the fund if she is not living with her husband at the time of his death, and has borne no share of the expenses of the burial, which have been paid by one of the relatives.[326]

§ 804. "Wife and Children"—"Widow and Children"—How They Take.—Under life policies and certificates of membership in mutual benefit societies made payable to the "wife and children," the beneficiaries will take equally per capita where their proportions in the fund are not otherwise

[323] Masonic Mut. Rel. Assn. v. McAuley, 2 Mackey (D. C.), 70; Addison v. Travelers' Assn., 144 Mass. 591. See Ballou v. Gile, 50 Wis. 614.

[324] Arthur v. Odd Fellows' B. Assn., 29 Ohio St. 557.

[325] Lamont v. Grand Lodge Iowa L. of H., 31 Fed. Rep. 177. See Highland v. Highland, 13 Ill. App. 510; Maneely v. Knights of Birmingham, 115 Pa. St. 305.

[326] Berlin B. Soc. v. Marsh, 82 Pa. St. 166.

specified.[327] So, also, will they share equally when the policy is made payable to the widow of the insured "for the benefit of herself and the children of said member." [328] In a case in Kentucky,[329] however, it was held that the fact that no proportion was fixed did not indicate an intention that they should share equally per capita, but that the statutory rule, under which the wife was entitled to one-third of the personalty and the children two-thirds, should prevail.[330] The fact that one of the children has, subsequently to the issuance of the policy or certificate, left her father's house and married, will not defeat her right to recover her share.[331] But where, however, one of the children died after suit was begun, on an insurance policy, under which five thousand dollars was to be paid as a benefit to the assured's wife "and children equally," it was held that the wife and remaining children were entitled to the full sum. It appeared, however, that there was another provision whereby, in the "event of their prior death," the fund was to be payable "to the legal heirs or devisees." [332] The doctrine of this case seems questionable, however.[333] A policy of insurance does not inure to the separate use of herself and children jointly, when taken out by a wife on her husband's life, under the Missouri statute, and payable to her or her legal representatives.[334] In a case which arose in England,[335] where a policy was taken out by the insured for the benefit of his "wife and children," in pursuance of the act of 1870, it was held that the widow and five children who survived him would take the money as joint tenants. In a Louisiana case[336] the wife and children of assured

[327] Milburn v. Milburn, 83 Ind. 55; Phœnix v. Grand Lodge A. O. U. W., 31 Kan. 81; 47 Am. Rep. 479; Cragin v. Cragin, 66 Me. 517; 22 Am. Rep. 588; Gould v. Emerson, 99 Mass. 154; 96 Am. Dec. 720.

[328] Jackman v. Nelson, 147 Mass. 300; 17 N. E. Rep. 529.

[329] Kelley v. Ball (Ky. C. A. 1892), 19 S. W. Rep. 581.

[330] See McLin v. Calvert, 78 Ky. 472; Goslin v. Caldwell, 69 Tenn. 474.

[331] Jackman v. Nelson, 147 Mass. 300; 17 N. E. Rep. 529.

[332] Covenant Mut. B. Assn. v. Hoffman, 110 Ill. 603.

[333] See Lane v. De Mets, 59 Hun (N. Y.), 462; 36 N. Y. St. Rep. 798; 13 N. Y. St. Rep. 347.

[334] Reed v. Painter, 129 Mo. 674; 31 S. W. Rep. 919.

[335] In re Davies' Policy Trusts, L. R. Ch. D. (1892), vol. 1.

[336] Tutorship of Crane, 47 La. Ann. 896; 17 S. Rep. 431.

were made payees of a policy of life insurance. He deceased, leaving a widow and two minor children, as issue of his marriage, surviving him. The widow accepted the community of acquests and gains, took possession of the entire estate as surviving spouse, and as usufructuary qualified as natural tutrix of the minors, and caused inventory to be made. The property inventoried was all community property. The amount of insurance money was collected by the widow, and used in payment of community debts and succession charges, but the amount was not carried into the inventory as an asset of the community property. It was held that this money inured to the widow and children in equal portions, share and share alike. The court, per Watkins, J., said: "It has been settled by repeated decisions of this court that money which is collected after the death of the husband and father upon a policy of life insurance made payable to his wife and children, is not an asset of the matrimonial community, but of their separate estates.[337] This principle is recognized by the New York court, that state being the habitat of the insurance company.[338] The last expression of this court upon the subject is found in Stuart v. Sutcliffe.[339] It thus appears that the interests or shares of the

[337] Citing succession of Bofenschen, 29 La. Ann. 711; Succession of Hearing, 26 La. Ann. 326; Succession of Clark, 27 La. Ann. 269; Pilcher v. New York L. Ins. Co., 33 La. Ann. 322; Succession of Kiegler, 23 La. Ann. 455; Putnam v. Insurance Co., 42 La. Ann. 739.

[338] Citing Barry v. Bruno, 71 N. Y. 62; Barry v. Life Ins. Co., 59 N. Y. 587; Dalton v. Wilmer, 52 N. Y. 312; referring, also, to Lemon v. Life Ins. Co., 38 Conn. 294; Life Ins. Co. v. Burroughs, 34 Conn. 305; Chapin v. Fellowes, 36 Conn. 132; Burroughs v. Life Assur. Co., 97 Mass. 359; Knickerbocker L. Ins. Co. v. Wiltz, 99 Mass. 159.

[339] 46 La. Ann. 240, where it was held that a life policy payable to assured, his executors, administrators, and assigns, does not constitute an asset of "the succession of a living person, and become amenable to the denunciation of R. C. C., 2454." "The denunciation of article 2454 of the code is directed against the sale of the succession of a living person, which it declares not to be the subject of a sale; evidently because such a sale would in the very nature of things be prospective and uncertain; the law declaring that 'succession is the transmission of the rights and obligations of the deceased to his heirs' ": R. C. C. 871, et seq.; Id., 246, per Watkins, J., citing also Putnam v. Insurance Co., 42 La. Ann. 739. "In which we said on reason and authority that as to her (the wife) the com-

two emancipated minors were assets to their separate estates respectively, and consequently they did not pass under their mother's usufruct, but they did pass under her administration as their natural tutrix.[340] Being charged under the law with the care of the persons of her wards, and entitled to represent them 'in all their civil acts,'[341] the natural tutrix was competent, and authorized to collect the insurance money on joint account for them and herself, and 'to administer their estates as a prudent administrator would do.'[342] The tutrix became thus lawfully possessed of the insurance money, but she incurred the consequent legal obligation of making restitution and account to her pupils at the dates of their respective majorities. This is not denied on either side, but a difference has arisen between opponents and accountant with regard to the amount of their respective shares of the insurance money, the widow claiming half and opponents two-thirds. In not one of the cases referred to was the question presented or decided. But it has been frequently decided in other jurisdictions. For instance, in Jackson v. Nelson[343] it was decided as follows, viz: 'It is plain Mrs. Nelson is not entitled to hold this money absolutely. Even under similar language in a will the children would have a right which they could enforce in a court of equity.[344] There is nothing to show that it was intended that the sums to be devoted to the benefit of the children should be, in the first in-

pany's contract was complete in its incipiency, and never changed thereafter with her consent. In law, this policy inured to her separate paraphernal benefit, though not separate in property from her husband, the insured, and its character of paraphernal property could not be changed to that of separate property of the husband, or that of the community without her consent lawfully obtained. As such it could not be placed as security for her husband's debts": Id. 247, 248, citing Succession of Kuglen, 23 La. Ann. 455; Pilcher v. New York L. Ins. Co., 33 La. Ann. 322.

[340] Citing C. C. 337.

[341] Citing C. C. 337.

[342] Citing C. C. 337.

[343] 17 N. E. Rep. 529.

[344] Citing Proctor v. Proctor, 141 Mass. 165; 6 N. E. Rep. 849; Loring v. Loring, 100 Mass. 340; Williams v. Bradley, 3 Allen (Mass.), 270, 281, 285; Rakes v. Ward, 1 Hare, 445; Crockett v. Crockett, 1 Hare, 451; In re Harris, 7 Exch. 344.

stance, determined by her, in her discretion, subject to accountability. There are no words saying it shall be at her disposal for their benefit, or that she is to maintain or support them. . . . . In the purposes of the Royal Arcanum, children are placed on an equality with widows. There is nothing showing any intention to have a permanent or continued trust. The words of the certificate are simple: She is to take money "for the benefit of herself and the children." In many of the cases under wills there was something to show, some discretion reposed in the primary donee, or some duty of support, or some power of disposal; but here there is nothing of the kind. Several of the cases under wills tend strongly to show that, under language like this, the widow and children would be entitled to share equally.[345] In the present case, in view of the circumstances and of the bald language used in the certificate, we cannot go behind the plain words, and are of the opinion that Mrs. Nelson and the three children are each entitled to one-fourth part of the money?' It will be observed that the terms of the certificate of membership involved in that case are almost identical with the terms of the policy of insurance that we have under consideration here. In Felix, Guardian, v. Ancient Order United Workmen,[346] the Kansas court held that a policy of life insurance which provides that the insurance money shall 'be paid to the wife and children' of the assured 'without designating in what portions the same shall be paid . . . . should be paid to his wife and children equally, each should receive an equal share, or, in other words, each should receive one-fourth of such fund. This is the natural construction of the language.' In that case there were three children of two different marriages. In Hamilton v. Pitcher[347] it was held that a deed 'to Mrs. Pitcher and her children' passed a title to them as grantees, and that 'they took as tenants in common; id certum est quod certum reddi potest. Mrs. Margaret W. Pitcher, being a tenant in common with her existing chil-

[345] Citing Jones v. Foote, 137 Mass. 543; Loring v. Loring, 100 Mass. 340; Proctor v. Proctor, 141 Mass. 165; 6 N. E. Rep. 849; Jubber v. Jubber, 9 Sim. 503.

[346] 1 Pac. Rep. 281.

[347] 53 Mo. 334.

dren, had a share in the lot equal to one of the children.' In Taylor v. Hill [348] the Wisconsin court held: 'As to shares which the widow and children are entitled to take under the policy, we are clearly of the opinion that, in the absence of any designation in the policy of inequality in the shares, all the beneficiaries shared equally.' In New York Life Insurance Company v. Ireland [349] the Texas court announced a similar principle. If we are to follow the course of jurisprudence of other states—and there is no reason why we should not upon a homogeneous subject—we must maintain the correctness of the judgment appealed from on this question. There is no analogy between the principle stated, and that governing the inheritance of forced heirs and the settlement of the legal community under our code, because, in the former case, the mother and widow is not an heir; and in the latter, the death of the father only passes his undivided share in the property. It bears a closer analogy to that controlling the universal legacy.[350] . . . . Our conclusion is to treat the question as res nova, and align our decision with those decisions we have quoted from other states, and affirm the judgment recognizing the tutrix and opponents as entitled to equal shares of one-third to each in the proceeds of the policy of life insurance."

§ **805. Wife and Children--Construction of Contract by Parties and Beneficiaries.**—If all the parties to the contract and the wife and guardian of the child have construed its terms as meaning that the wife and children share equally, the question whether the policy is only payable to the children in case of the wife's death before her husband will not be considered by the court in proceeding against the guardian.[351]

§ **806. Wife and Daughters—Survivor—Who Entitled to Fund.**—If the policy designates the wife and two daughters as beneficiaries, and is for their "express benefit," they

[348] 56 N. W. Rep. 738.
[349] 14 S. E. Rep. 617.
[350] Citing R. C. C. 1606, 1609.
[351] Taylor v. Hill, 86 Wis. 99; 56 N. W. Rep. 738.

will be entitled to share equally, and their rights are transmissible, but where only one daughter survives, she is held entitled to her third, and also to another third as legatee under her mother's will, the remaining third being held to pass to the other daughter's heir.[352]

§ 807. "Wife, if Living," and "if Not Living, to Children."— If there is a provision that the proceeds of the policy or certificate shall be payable to the wife "if living," and "if not living, to her children," she will be entitled to the fund if she survives her husband, but in case she does not survive him, those children who are living at the time of her death will be entitled to recover, and if any child who died prior to her death has left any surviving children, these children will not be entitled to any portion of the proceeds. Those children who are living at the time of the wife's death will be vested with all interest in and right to the fund.[353] But where a wife insured the life of her husband, the amount payable to herself if living, if not living then to their children, and she died before her husband, and one of the children died before him, leaving a child, it was held that a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent, and was entitled to the portion of the fund which the parent would have received if living.[354] In a case in New Hampshire,[355] the wife having died prior to her husband, it was held that the child of her deceased child, who survived, would take C.'s share, while the widow of insured's son, who survived, would receive nothing. Where a policy was issued payable to the wife if living, and if not to "their children," and the wife died before her husband, leaving one child, and the insured subsequently married, and had another child by his second

[352] So held in Small v. Jose, 86 Me. 120; 29 Atl. Rep. 976.

[353] Walsh v. Mutual L. Ins. Co., 133 N. Y. 408; 45 N. Y. St. Rep. 123; 31 N. E. Rep. 228; overruling 39 N. Y. St. Rep. 710; 61 Hun (N. Y), 91. See Lane v. De Meto, 59 Hun (N. Y.), 462; 36 N. Y. St. Rep. 798; 13 N. Y. St. Rep. 347.

[354] Continental L. Ins. Co. v. Palmer, 42 Conn. 60.

[355] Connecticut M. L. Ins. Co. v. Fish, 59 N. H. 126.

wife, it was held that the child by the first wife was entitled to the entire amount of the insurance.[356] If a policy of insurance has been issued on the life of a husband payable to his wife, or, in event of her death before him, to their children, and she dies leaving him surviving, if he surrenders the policy and takes out another in his own name for the same amount, for his sole benefit, paying the same premium, the new policy being dated back so as to be of the same date as the old one, the children must be held to have advanced the consideration for the new policy, and they are entitled to the avails thereof upon his death, in preference to his creditors.[356a] Under a code provision that the wife may insure the life of her husband, free from all claims by his creditors or personal representatives, and that the same shall be payable to her if she survives him, but if not, it may be made payable to their children; it is held[357] that the interest of the wife is contingent upon the death of her husband, and that the children will not take the proceeds unless there is an express provision to that effect.[358]

§ 808. Wife or any Wife That may Survive, and Minor Children.—If a life policy is payable to the "wife of" the member, her Christian name being given, "or any wife that may survive him, and minor children living at the time of his death," and the member marries a second time, and dies, leaving a widow, and minor children by both wives, the policy refers to all the minor children living at his death, and the persons named take per capita. The fund is no part of the assets of the estate of deceased, and the law of descents and distributions has no application.[359]

[356] Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221.

[356a] Chapin v. Fellowes, 36 Conn. 132.

[357] Tompkins v. Levy, 87 Ala. 263; 6 S. Rep. 346; under Ala. Code 1876, secs. 2733, 2734.

[358] But see section in this chapter as to vested interest in life policy.

[359] So held in Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. Rep. 492; citing Felix v. Grand Lodge A. O. U. W., 31 Kan. 81; 47 Am. Rep. 479 (a case of beneficiary certificate); Campbell v. Wiggins, Rice Eq. (S. C.) 10. See sec. 830, herein.

§ **809. "Wife" or "Widow" as Beneficiary.**—If a person procures a policy of life insurance and names his wife as beneficiary therein, her interest in the policy is a vested one,[360] and a surrender of the policy by the husband is inoperative as to her,[361] it inures to her sole and separate use and benefit,[362] and the member's administrator cannot recover a death benefit.[363] The widow is entitled to the benefits where the member fails to designate the beneficiary, and the by-laws of the society provide that benefits shall be payable to the person designated at the time or subsequently, "otherwise to my wife." [364]

§ **810. When Wife Entitled against Husband to Proceeds of Surrender Policy.**—The wife is entitled, as against her husband, to the proceeds of a surrender of a policy made under the statute on her husband's life for her benefit, he being largely indebted to her, and she paying all the premiums after the first.[365]

§ **811. Wife's Rights—Delivery of Policy as Security.** A wife's contingent interest in a policy on her husband's life for her benefit, or, in case of her death, then for her children,

[360] Kentucky etc. Mas. L. Ins. Co. v. Miller, 13 Bush (Ky.), 489; Packard v. Connecticut Mut. L. Ins. Co., 9 Mo. App. 469.

[361] Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

[362] Evans v. Opperman, 76 Tex. 293; 13 S. W. Rep. 312.

[363] McNeil v. Golden Cross, 131 Pa. St. 339.

[364] Burlington Vol. Rel. Dept. of C. B. & Q. Ry. Co. v. White, 41 Neb. 547; 59 N. W. Rep. 747, 751.

[365] Sheets v. Sheets, 4 Colo. 450; 36 Pac. Rep. 310, opinion by Reed, J. "The wife, aside from the marital relation, had by reason of the advances of money made to him an insurable interest in the life of her husband": Id. 453; citing Cammack v. Lewis, 15 Wall. (U. S.) 643; Connecticut Mut. Ins. Co. v. Luchs, 108 U. S. 498; Brockway v. Connecticut Mut. Ins. Co., 29 Fed. Rep. 766. The court also said: "Admitting that the husband paid one premium with his own money does not change the contract, nor in any way affect it (Triston v. Hardy, 14 Beav. 232; Burridge v. Roe, 1 Y. & C. Chy. 183). . . . . The wife was the absolute and sole owner of the policy of insurance; her title was as absolute as that to any other property bought and owned by her": Id. 453, 454; citing Triston v. Hardy, 14 Beav. 232; Glanz v. Gloeckler, 104 Ill. 573.

is only pledged by a mere delivery of the policy to secure the joint note of herself and husband, but the policy is not assigned in such case where it provides for assignment only by writing.[366]

§ 812. **When Wife has Only Equitable Lien.**—If sums are advanced for assessments on a policy on another's life, under an agreement that the one making such advances shall hold the policy as security for their repayment, and his wife's name is inserted in the policy merely to make the security more effectual, the wife has only an equitable lien to the amount of her husband's advances.[367]

§ 813. **Wife's Rights Where Husband's Misrepresentations Induce her to Join Assignment.** — If an assignment as collateral security of a policy on the husband's life, is made by him and his wife, who is the beneficiary, and the assignee has acted in good faith, without knowledge of claimed misrepresentations made by the husband to his wife, as to the amount of his indebtedness, she cannot avail herself of such misrepresentations as against said assignee.[368]

§ 814. **"Wife"—Effect of Payment to Woman Designated as Wife While Lawful Wife Living.**—If the society, in good faith, pays the fund to a woman to whom the insured has directed payment, and in such direction has designated her by name as his wife, this will operate as a bar to any claim on the part of the lawful widow of the member against the society.[369]

[366] So held in Travelers' Ins. Co. v. Healey (N. Y. S. C.), 86 Hun (N. Y.), 524; 67 N. Y. St. Rep. 686.

[367] McDonald v. Humphries, 56 Ark. 63. The certificate was in the American Legion of Honor, a mutual life insurance society. Under the by-laws, certificates could only be issued for "the benefit of the member's family or those dependent upon him for support." It was admitted that the wife of the holder of the policy (the wife being payee) was not within said class.

[368] So held in Kulp v. Brant, 162 Pa. St. 222; 29 Atl. Rep. 729.

[369] So held in Supplee v. Knights of Birmingham (Pa.), 18 Week. Not. Cas. 280. See section 816, herein.

§ 815. **"Wife" as Beneficiary—No Marriage Ceremony Performed.**—Though there may never have been any marriage ceremony performed, yet if a woman and man have lived together as man and wife, and under the laws of the state in which they have so resided they are recognized as man and wife, the woman will take as beneficiary, under a policy issued to the man insuring his "wife" as beneficiary, or under the general provision of a charter making the fund payable to the "wife." [370]

§ 816. **"Wife or "Widow" as Beneficiary Where Insured has Married When Lawful Wife Living.**—In two cases in New York[371] the question has arisen as to who is entitled to the funds, upon the death of a member of a mutual benefit society, under a certificate which is payable to the wife or widow of the member, where it appears that the member had a lawful wife living at the time of his pretended marriage to the woman with whom he was living at the time of his death. Although in one of these cases[372] it was held that the woman with whom the member was living at the time of his death could recover, yet this cannot be considered as decisive of the question under all circumstances. There are several elements which enter into the consideration of the question. If it clearly appears that the society has recognized the woman as the beneficiary who will be entitled to the proceeds, then she may recover. Though the by-laws provide that the fund shall be payable to the wife or widow of the insured, and thus may contemplate the lawful widow, it does not prevent the society from recognizing one as beneficiary who may be occupying the relation of wife to the insured. On the other hand, the provision can reasonably be said to have presumably in contemplation only the lawful wife or widow of the member.

[370] See Watson v. Centennial Mut. L. Assn., 21 Fed. Rep. 698.

[371] Story v. Williamsburgh Mas. B. Assn., 95 N. Y. 474. In this case the woman with whom the insured was living at the time of his death was held entitled to recover: Schnook v. Independent Ord. S. of Benj., 21 Jones & S. (53 N. Y. Super. Ct.) 181. In this case the facts were held insufficient to warrant such a recovery. This last case distinguishes the former. See sec. 814, herein.

[372] Story v. Williamsburgh Mas. B. Assn., 95 N. Y. 476.

To enable a woman to recover who is not the member's legal wife, though holding to him presumably the relation of wife, it should clearly appear that the society recognized her as the beneficiary to whom the fund should be payable. The mere fact that one has lived with the member as his wife does not establish that the society has accepted her as beneficiary, to the exclusion of a lawful wife living when the member deceased. So the mere designation either in the charter or by-laws, or in the certificate, that the fund shall be payable to the "wife" or "widow" of the member, should be construed as referring only to the lawful wife or widow, and the fact that one is occupying the relation of wife to the insured, when he has a former legal wife living, should not enable her to recover, though she believes herself the lawful wife. Concubinage is not encouraged by the courts.[373]

§ 817. "Wife" or "Widow" as Beneficiary—Regular Life Policy—Effect of Divorce.—It is a general rule in life insurance that if a policy is valid at its inception, it will not be avoided by a subsequent cessation of the insurable interest, in the absence of a provision in the contract to that effect, and provided the interest was not merely a colorable one, simply intended to avoid the rule as to wager policies. We have already seen that a wife has an insurable interest in the life of her husband, and that when a policy of regular life insurance is taken out, in which she is named as beneficiary, she has a vested interest in the policy;[374] therefore, in accordance with the above principles, it would seem to follow that if a policy is taken out upon a husband's life, and the wife is named as beneficiary therein, a subsequent divorce would not destroy her rights under the policy.[375] This question, however, arose in a case before the Connecticut supreme court,[376] where it ap-

[373] Bolton v. Bolton, 73 Me. 299; Grand Lodge v. Elsner, 26 Mo. App. 108; Schnook v. Independent Ord. S. of Benj., 21 Jones & S. (53 N. Y. Super. Ct.) 181.

[374] See section in this chapter as to vested interest.

[375] Insurance Co. v. Schaffer, 94 U. S. 457; McKee v. Insurance Co., 28 Mo. 383; Ætna L. Ins. Co. v. Mason, 14 R. I. 583.

[376] Phœnix L. Ins. Co. v. Dunham, 46 Conn. 79.

peared that a husband procured a policy on his life payable to his wife, for her sole use, or, in case of her death before his, to their children; the charter of the insurance company providing for such insurance and protecting the interests of the beneficiaries. The policy was issued to the wife and delivered to and kept by her. She obtained a divorce seven years after, and afterward, without his knowledge, surrendered the policy to the company and took a paid-up one, conforming in all respects to the original. The husband had paid the annual premiums except the one next preceding the divorce, which was paid by her. There were no children. She died soon after, and a little later he also deceased, and it was held that her representatives, and not his, were entitled to the insurance money.

§ 818. "Wife" or "Widow" as Beneficiary—Mutual Benefit Certificate—Effect of Divorce.—The effect of divorce seems to be to terminate the relation of "wife" under a mutual benefit certificate, so that if a wife is designated and she obtains a divorce, she loses her right to claim any part of the fund. This rule rests on the ground that the status of the beneficiary, being the sole inducement for the insurance, the object of the benefit is and always remains in the person filling that particular status, and the name, when given, is a mere descriptive designation.[377] And this rule has been supported where the payment of the fund is limited to the "heirs or members of his family." [378] In this case the court, per Knowlton, J., said: "There must then be a relation to the deceased, such as is contemplated by the agreement of association and the by-laws relating to payment, and this view is strengthened by a consideration of the statute under which the association was organized.[379] At the time of the death of L. E. Taylor, his former wife, Etta A. Taylor, was not a member of his family, nor one of his heirs, but her connection with him had been severed by the divorce. We therefore think she had lost her

[377] Order of Ry. Conductors of America v. Lally (St. L. C. A. 1894) 3 Mo. Leg. News, 136.

[378] Tyler v. Odd Fellows' Mut. Rel. Assn., 145 Mass. 134.

[379] Pub Stat., c. 115, secs. 2, 8; Elsey v. Odd Fellows' Rel. Assn., 142 Mass. 224.

rights under the designation of her former husband, and was not entitled to anything from the defendant association after his death." [380] The insured, before his death, also changed the beneficiary. So in a case in the Missouri court of appeals it is held that if the articles of incorporation of a benefit society provide that the proceeds of a benefit certificate shall be payable in accordance with the will of the insured, and if there is no will, then to his widow, his child, or children, or to his mother, a divorced wife is not enttled to the proceeds of a certificate made payable to the wife, especially where she has married another.[381]

§ **819. Articles of Separation.**—Articles of separation executed subsequently to naming the wife as beneficiary do not preclude her recovering the fund, even though there is an attempted transfer by will and assignment.[382]

[380] Id. 136.

[381] Order of Railway Conductors v. Koster, 55 Mo. App. 186. That divorce terminates rights of "wife" in fund, see Schonfield v. Turner, 75 Tex. 324; 7 L. Rep. Annot.; 19 Ins. L. J. 238; American Legion of Honor v. Smith, 45 N. J. Eq. 466; Order of Ry. Conductors of America v. Lally (St. L. C. A. 1894), 3 Mo. Leg. News, 136.

[382] Jinks v. Banner Lodge, 139 Pa. St. 414; affirming 37 Pa. L. J. (Pa.) 446.

CHAPTER XXVI.

BENEFICIARIES—CONTINUED.

§ 825. Subsequent marriage of insured.
§ 826. Widow and surviving children—Second marriage.
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§ 882. Statute: Rights of children: Declaration of new trust.

§ **825. Subsequent Marriage of Insured.**—The marriage of the insured subsequent to the issuance of a benefit certificate, in which some third party is named as beneficiary, and who under the laws of the society may be entitled to recover, will not of itself affect the right of said beneficiary to recover.

Thus, where a member of a voluntary benevolent association named his sister as beneficiary, it was held that his subsequent marriage and written notification to his wife that he desired her to have all his effects did not operate to divest the sister of her right to the amount.[1] So the fact that a member subsequently marries will not revoke a designation made by the member in his application, where the designation is within the statutory provision and which enumerates those who may be named as beneficiaries, and within the constitution specifying the objects of the society, and the designation is one to which the association has a right to assent, and does assent.[2] And where a person designated his mother as beneficiary it was held that his subsequent marriage did not destroy her right to recover.[3] If, however, the constitution of a society provides for the payment of a fund to the widow, or, in case of her death, to her children, and also provides that if a member is named he may bequeath a certain part of the fund to one or all of his children, but further provides that a certain amount of it at least must go to his widow, a subsequent marriage of the member will revoke a designation to a third party, and the widow will be entitled to the fund.[4] But if under the statute the wife and children would have been entitled to the insurance money, had the policy been taken out after marriage, it will inure to their benefit if taken out before marriage.[5]

§ 826. Widow and Surviving Children—Second Marriage.—If a life policy is payable to insured's legal representatives "for the benefit of his widow, if any, and his then surviving children, in equal shares," a granddaughter, child of a deceased daughter, is not a beneficiary, and will not take as such over a widow by a second marriage and a surviving daughter.[6]

[1] Highland v. Highland, 109 Ill. 366.

[2] Massachusetts Cath. Ord. of For. v. Callahan, 146 Mass. 391; 16 N. E. Rep. 19.

[3] Massachusetts Cath. Ord of For. v. Callahan, 146 Mass. 391; 6 N. E. Rep. 95. See Benton v. Brotherhood of R. R. Brakemen (Ill. 1893), 34 N. E. Rep. 939.

[4] Sanger v. Rothschild, 123 N. Y. 577; 50 Hun (N. Y.), 157; 2 N. Y. St. Rep. 794.

[5] Rose v. Wortham, 95 Tenn. 505; 32 S. W. Rep. 458.

[6] Small v. Jose, 86 Me. 120; 29 Atl. Rep. 976.

§ 827. Where Beneficiary under Mutual Benefit Certificate Dies before Assured.—Since the weight of authority supports the rule that the interest of the beneficiary under a mutual benefit certificate is a mere contingency or expectancy, and the insured may at any time before his death revoke the designation, and name a new beneficiary,[7] it would follow that upon the death of the beneficiary neither his nor her heir, nor a personal representative who is not designated, will have any rights under the policy which may be enforced. In other words, the death of a beneficiary before that of a member in this class of associations terminates his contingent interest in the fund.[8] In those cases, however, where it is held that the interest of the beneficiary under a benefit certificate is a vested one, whether under a statutory provision or otherwise, the rule would necessarily seem to be in conformity with the doctrine of vested interest, or should at least be a rule analogous to that which obtains under regular life policies. As a general rule, if a person effects insurance in a mutual benefit society on his life, making it payable to his wife or other beneficiary, without mentioning the executors, assigns, or other representatives of such beneficiary, and he survives the person designated, the direction as to the beneficiary is thereby abrogated.[9] The cases are in harmony to the effect that the interest is not a vested one where there is a provision in the statute of incorporation, constitution, charter, or by-laws, or in the benefit certificate or contract, giving the member the right to subsequently appoint some other person who shall be entitled to the benefits. It would also follow, as stated elsewhere, that if there is some provision reserving to the insured this right, the interest of the beneficiary must be recognized as a mere expectancy, subject to be defeated by the member. If the mother is named as a beneficiary, and she dies before the member, he leaving a widow, the latter, and not the mother's, estate is entitled to the fund.[10] So where a mutual benefit association, which by its

[7] See sec. 741, herein.

[8] Wood v. Lenawee Circuit Judge, 84 Mich. 521.

[9] Given v. Wisconsin O. F. M. L. Ins. Co., 71 Wis. 547; 37 N. W. Rep. 817. See Johnson v. Van Epps, 110 Ill. 551.

[10] Arthars v. Baird, 8 Pa. Co. Ct. 67.

constitution and by-laws conferred upon its members the right to participate in a beneficiary fund, and "to hold, dispose of, and fully control said benefit at all times," issued a certificate of membership to a person, reciting that he was entitled "to participate in the beneficiary fund of the order to the amount of two thousand dollars, which sum shall at his death be paid to his wife, E.," and the wife died first, it was held that she had only an expectancy, dependent on her husband's will, which did not pass to her personal representative at her death.[11] In a case which arose in Wisconsin[12] the wife, who was designated as beneficiary in a benefit certificate issued to her husband, died before him, and it was held that the statute[13] permitting a husband to insure his life and make the policy payable to his wife, to her sole and separate use, did not give her a vested interest, which upon her death could pass to her personal representatives, as the statute did not apply to the certificates of mutual benefit societies.[14] In a later case in the same state,[15] where a person designated his wife as beneficiary, and she subsequently died, and he married again, but made no change in the designation, it was held that the interest of the first wife was not a vested one, and as the society provided for aid to the "widows, orphans, and heirs of deceased members," and that on the death of the member the fund should go to the widow or designated heirs, that the widow would receive the fund, and not the children by his first wife.[16] In Arkansas,[17] it is held that the interest of the beneficiary under a mutual benefit certificate is a vested one, and will descend to the heirs of the beneficiary upon the latter's death. A mutual benefit certificate which is payable to the wife of the member,

[11] Richmond v. Johnson, 28 Minn. 447. See, also, Gutterson v. Gutterson, 50 Minn. 278; 52 N. W. Rep. 530.

[12] Given v. Wisconsin O. F. M. L. Ins. Co., 71 Wis. 547; 37 N. W. Rep. 817.

[13] Rev. Stat. Wis., sec. 2347.

[14] See sec. 878-882, herein on statutes.

[15] Riley v. Riley, 75 Wis. 464; 44 N. W. Rep. 113.

[16] See sec. 825, herein. When married woman beneficiary dies before her husband; children's rights: Swan v. Snow, 11 Allen (Mass.), 224.

[17] Johnson v. Hall, 55 Ark. 210; 17 S. W. Rep. 874.

her heirs, or assigns, where she dies before her husband, will, if he neither marries again nor makes any new designation, become a part of her estate, and he or his estate will take a share equal to that of each of her children.[18] Where the fund was made payable to the wife of the assured or her legal representatives, and she died during his lifetime, it was held that a designation of a beneficiary by will was not sufficient to defeat the rights of the heirs of his deceased wife.[19] If, however, an insurance on the life of a husband is payable to his wife or her legal representatives, and the husband pays the premiums, and he has the right to change the beneficiary by consent of the insurers, but the wife and then the husband dies, it is held that the insurance money belongs to the husband's estate.[20]

§ 828. Where Beneficiary Under Life Policy Dies Before Assured.—We have already seen that the beneficiary under a life policy acquires a vested interest therein.[21] In accordance, also, with the principle that vested interests are transmissible, it would follow that upon the death of the beneficiary, whether before or after that of the insured, the right to the proceeds ought to pass by bequest or succession, as other personal assets of the beneficiary.[22] So where a husband insured his life for his wife's benefit, and she died before him without disposing of her right under the policy, the administrator upon the wife's estate was held entitled to the insurance money.[23] So it is held in Connecticut, where a wife pro-

[18] Mutual Aid Soc. v. Miller, 107 Pa. St. 162.

[19] Olmsted v. Masonic Mut. B. Soc., 37 Kan. 93; 14 Pac. Rep. 449.

[20] Washington B. End. Assn. v. Wood, 4 Mackey (D. C.), 19; 54 Am. Rep. 251.

[21] See sec. 730, herein.

[22] Drake v. Stone, 58 Ala. 133. See note 11 Am. St. Rep. 721, "Results of the death of a beneficiary before the death of a person whose life is insured."

[23] Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285 (noted in Small v. Jose, 86 Me. 124; 29 Atl. Rep. 976). The Indiana case considers at length the transmissibility of such a right, noting Bliss on Life Insurance, 2d ed., 540; Id., sec. 318; Hutson v. Merrifield, 51 Ind. 24; 19 Am. Rep. 722; Pence v. Makepeace, 65 Ind. 345; Wilburn v. Wilburn, 83 Ind. 55; Keller v. Gaylor, 40 Conn. 343; Chapin v. Fellowes, 36 Conn. 132; 4 Am. Rep. 49; Crittenden v. Phœnix Mut. L. Ins. Co.,

cured a policy of insurance upon the life of her husband; payable to her if living, if not, to her children, and both she and one of her children died before the husband, that there was a transmissible interest in the children upon the issue of the policy, and the heirs of the deceased child took, and were entitled, to a portion of the amount insured.[24] And where a father insured his life for the benefit of his infant daughter, he himself paying the premiums and retaining the policy, the policy running to the daughter, her executor, etc., it was held that on her death the legal representative of the daughter was entitled to the possession of the policy.[25] But where the beneficiary died, the policy being on the life of his son, and the daughter after her father's death, being urged so to do by defendant's agents, took out additional insurance on her brother's life, and paid the premiums on the policies until her brother's death, she was held entitled to the money due on the policies.[26] In a case in Indiana, a wife holding a policy of insurance on the life of her husband died, leaving surviving her husband, father, mother, brothers, and sisters; afterward, the husband died, leaving surviving his father, and also brothers and sisters, none of whom left children; it was held that the wife had such an interest in, and ownership of, the policy and right to the proceeds as would, on her death, descend to her heirs, though her husband had survived her.[27] In a later case in the same state,[28] where it appeared that the insured had made his policy payable to himself and assigns, for the benefit of his wife, and his wife died, leaving two children, it was decided that, under the intestate laws of Indiana, he was entitled to one-third of the policy, and the two children to two-thirds.

41 Mich. 442; Connecticut Mut. L. Ins. Co. v. Burroughs, 34 Conn. 305; Ruppert v. Union Mut. Ins. Co., 7 Rob. (N. Y.) 155; Ricker v. Charter Oak L. Ins. Co., 27 Minn. 193; 38 Am. Rep. 289.

[24] Continental L. Ins. Co. v. Palmer, 42 Conn. 60; 19 Am. Rep. 530. See, also, Chapin v. Fellowes, 35 Conn. 132; 4 Am. Rep. 49.

[25] Glanz v. Gloeckler, 104 Ill. 573; 44 Am. Rep. 94 (two judges dissenting).

[26] Metropolitan L. Ins. Co. v. Anderson, 79 Md. 375; 29 Atl. Rep. 606

[27] Hutson v. Merrifield, 51 Ind. 24.

[28] Hawley v. Heiss, 86 Ind. 196.

In an Iowa case it is held that if the wife, to whom or "her legal representatives" the amount of insurance is payable within a certain time after the insured's death, or if she should not then be living to her children, and she dies before the insured, her interest ceases, and the term "legal representatives" will be construed to mean some one appointed by her to receive the fund, and not her administrator, so that the creditors of her estate have no claim on the money.[29] By a Maine statute,[30] the proceeds of an insurance which one has, according to the act, effected upon his own life, and to the benefits of which he was entitled at the time of his decease, make no part of his estate, but will be distributed as therein provided. And if such insurance be effected for the benefit of the wife of the insured, her heirs become entitled on her death; upon their death, during the life of the husband, if he be their heir he takes, and on his death the fund takes the course provided by the statute.[31] In a later case in the same state it appeared that the husband, who had procured a policy payable to his wife, her heirs, executors, etc., had subsequently, by agreement with the company, allowed the policy to lapse, and obtained a new one payable to himself, the old policy being a part of the consideration for the issuance of the new, and it was held that the respective estates of the husband and wife would share in the proceeds of the new policy, in proportion to the premiums paid respectively by each.[32] It is decided in Ohio that in case of a life policy, where the premiums are paid by assured, if all the beneficiaries die before him, the policy reverts to him, and becomes subject to administration and bequest as his personal estate.[33] So it is held in Massachusetts[34] that if a policy

[29] In re Conrad's Estate, 89 Iowa, 396; 56 N. W. Rep. 535.

[30] March 21, 1844.

[31] Libbey v. Libbey, 37 Me. 359.

[32] National L. Ins. Co. v. Haley, 78 Me. 268; 57 Am. Rep. 807. See Whitehead v. New York L. Ins. Co., 102 N. Y. 143; 55 Am. Rep. 787.

[33] Ryan v. Rothweiler, 50 Ohio St. 595; 35 N. E. Rep. 679. "While there may have been a vested interest, it was an interest not in possession, but in expectancy, liable to be divested by the death of the beneficiary before the death of the assured": Id. 601, per Burkett, J.

[34] Swan v. Snow, 11 Allen (93 Mass.), 224.

of insurance on the life of the husband is issued to a married woman, in consideration of the payment of an annual premium, and she dies before the husband, neither he nor his administrator will acquire any property in the policy by his subsequent payment of the annual premium, but that it vests at her death in the administrator of her estate for the benefit of her children. But under later laws the proceeds of an insurance policy payable to the wife of the insured will, upon her death intestate prior to her husband's, and leaving no children, belong to the estate of the insured.[35] In another case it was held that where a policy is payable to the children of the insured, and some of them die before the insured, a share of their interest will vest in him.[36] An act of New York[37] provides that a wife may insure her husband's life, and if she survives him the insurance shall be paid to her, free from the claims of his representatives or creditors. And in the case of the death of the wife during the husband's lifetime, the policy may be made payable after her decease to her children and to their guardians, if under age. So where such a policy was procured and made payable to the wife, or in case of her death before her husband's then to the children, it was held that she having died before him the policy became vested in the children, and should be paid to those surviving, and that if any had died the shares of such children should be paid to their administrators.[38] If, however, the wife, who is the beneficiary under such a policy, dies intestate, and leaves no descendants, it is held that the policy will become vested in her husband without regard to the fact whether he has reduced the chose in action to possession or not.[39] If the wife to whom a life policy is payable dies before her husband, her interest, being a chose in action, passes to him on her death, and he has a right to assign, transfer, or will it, and, failing to do so, his personal representatives may enforce the obligation as against a repre-

[35] Cole v. Knickerbocker L. Ins. Co., 63 How. Pr. (N. Y.) 442.

[36] Sheilds v. Sharp, 35 Mo. App. 178.

[37] Act 1840, secs. 1, 2.

[38] United States Trust Co. v. Mutual B. L. Ins. Co., 115 N. Y. 152; 21 N. E. Rep. 1025.

[39] Matter of Warner, 32 N. Y. St. Rep. 897.

sentative of the wife.[40] A policy on the husband's life, payable to the wife or her representatives after the death of husband and wife, goes to the wife's administrator, and the husband's administrator is entitled to an equal share with the children of the wife, she having died intestate.[41] In a case in Pennsylvania,[42] where the insured designated his wife as beneficiary, it was held, she having died and left five children, that, under the intestate laws of that state, the administrator of the insured was entitled to one-sixth of the proceeds.[43] And again in a case which arose in South Carolina,[44] where a person procured a policy on his own life, making it payable to his wife and children, share and share alike, it was held, one of the children having died, that a share of that child's interest would pass to the representatives of the insured under the intestate laws of that state. In Illinois, if an insurance policy is made payable to the wife of the insured, "or the legal representatives of the said assured," the wife's interest is held not a vested one until the death of the husband, and in case she dies first, the proceeds of the policy will be payable to his executor or administrator.[45] In a case in North Carolina[46] it is decided that if a wife, who is named as beneficiary in a policy upon her husband's life, dies before him, her interest in the policy will become assets in the hands of her husband's administrator. In New York, if a person procures a policy of life insurance

[40] Waldheim v. John Hancock Mut. L. Ins. Co. (N. Y. 1894), 59 N. Y. St. Rep. 413; 28 N. Y. Supp. 766.

[41] Baltz's Estate, 12 Phila. (Pa.) 29.

[42] N. B. Mut. Aid Soc. v. Miller, 107 Pa. St. 162. This was the case of an action on a mutual benefit certificate; the interest of the beneficiary, however, was a vested one.

[43] See, also, Adamson's Executor, 85 Pa. St. 202.

[44] Macaulay v. Cent. Nat. Bank, 27 S. C. 215.

[45] Johnson v. Van Epps, 110 Ill. 551. If the wife is named as beneficiary, and she dies before the member, her personal representatives are not entitled to the fund as against the member's heirs where both husband and wife leave collateral heirs and the constitution provides that in the case of death of all the beneficiaries before the member's decease the benefit shall be paid to his heirs, no other disposition being made, and the member has failed to make any change of beneficiary: Espy v. American L. of H. (Pa.), 7 Kulp, 134.

[46] Simmons v. Biggs, 99 N. C. 236; 5 S. E. Rep. 235.

payable to a trustee for the benefit of his own wife, and the wife dies before the insured, who subsequently marries, the proceeds will be payable to the widow, to the exclusion of children of the former wife, where it appears to have been the intention of the insured to provide for his widow instead of his children.[47] In another case in the same state[48] it is held that if the beneficiary first designated dies, the insured may designate a new beneficiary where he has paid all premiums himself and the first designation was a gratuitous one, especially if he has retained possession of the policy. In other cases, it has been held that where the beneficiary dies, the insured may designate a new beneficiary.[49] In another case it is held that upon the death of the beneficiary before the member, no new designation having been made, the family or dependents of the member, as provided by the constitution, will take, and not the next of kin, or collateral relatives, even though it is also provided that in such case "the share of such deceased beneficiary shall be paid to his or her legal representatives," as such latter provision merely designates the person to whom payment may be made to discharge the association.[50]

§ 829. Where Beneficiary Dies before Insured—Life Policy—Conclusion.—From a consideration of the cases in the preceding section, it will be seen that they are not all in harmony. In the majority, however, it will be found that the courts in life policies, unless there is something to the contrary in the contract, have not been inclined to sustain the view that upon the death of the beneficiary the insured may designate a new one, who will be entitled to recover the proceeds. The question of intention has been raised as sustaining the right of the insured to so do. If we admit that the intention must control, it would seem that it would have to be a very

[47] Olmstead v. Keyes, 85 N. Y. 593. See sec. 825, herein as to marriage.

[48] Bickerton v. Jaques, 28 Hun (N. Y.), 119; 12 Abb. N. C. (N. Y.), 25

[49] Gambs v. Covenant Ins. Co., 50 Mo. 44; Mutual B. L. Ins. Co. v. Atwood, 24 Gratt. (Va.) 497; Kerman v. Howard, 23 Wis. 108.

[50] Simon v. O'Brien, 87 Hun (N. Y.), 160; 33 N. Y. Supp. 815.

clear case of intention of the insured to take it out of the general rule, which we conceive to be as follows: If a person designates another as beneficiary under a regular life policy, and the person designated dies before the insured, then, in the absence of anything to the contrary in the contract, the interest in the policy will pass to the executor or administrator of the beneficiary, and be subject to distribution under the intestate laws of that state. If the person designated is a wife or some near relative of the insured, and the latter would, under the intestate laws, be entitled to a share of the personal estate of such person, then under these same laws the executor or administrator of the insured will be entitled to the same interest in the proceeds of that policy which he would have been entitled to claim in the other personal estate of the beneficiary.

§ 830. Death of Wife—Subsequent Marriage of Member—Effect where Wife is Designated as Beneficiary.—If a person takes out a regular policy of life insurance, and designates his "widow" as beneficiary, and his wife afterward dying he subsequently marries, the intent of the person must govern, and in such a case there is clearly the intent to provide for the widow of the insured, and not the heir of the first wife. Consequently, the second wife, who becomes the actual widow, will be entitled to the proceeds.[51] In New York,[52] in a case where a man had procured a policy of life insurance payable to a trustee for the benefit of his wife, and the wife then living afterward died, and the insured subsequently had the policy assigned by the trustee to his second wife, it was held that the common-law right of survivorship in the husband was not affected by the statutes concerning insurance upon the lives of husbands for the benefit of their wives, and that the widow of the insured was entitled to the proceeds. In Pennsylvania, if the wife is named as beneficiary, and dies, and the member again marries, but fails to change his certificate, his widow surviving will take the fund under a by-law providing that in case of the beneficiary's death before that of the member, no

[51] Phelan v. Phelan (La. Par. of Orl. C. A. 1891), 21 Ins. L. J. 93.
[52] Olmsted v. Keyes, 85 N. Y. 593.

other person being designated, the benefits shall be paid to the widow.[53] Where the purpose of the charter of a mutual benefit society is to provide for the "widow, orphan, heir, assignee, or legatee" of the member of a mutual benefit society, and a member designates his wife as beneficiary, and the wife then living dies, and the member subsequently marries, the fund will go to the second wife who survives him, and not to the heirs of the first wife.[54] In such a case, also, the object of the member is to provide for his widow. There is no reason why he should provide for the wife's relatives, and it would seem that a failure of the insured to make a new designation could not be reasonably construed as a desire to designate his heirs as beneficiaries. In another New York case,[55] where the rights of the heirs of the first wife to the fund were in question, the following facts appeared: A person, by name H. M. Case, procured a benefit certificate, in which was the following provision: "All payments or benefits that may accrue or become due to the heirs of the person insured by virtue of this policy will be payable to Mrs. H. M. Case, or lawful heirs." After the death of his wife, who was living at the time of the issuance of the certificate, the insured again married. This wife survived him, as did also his daughter by the former wife. In an action to determine who was entitled to the fund, the court held that the whole fund was payable to the daughter, and that his widow had no claim to the proceeds. The court said: "There was no new designation of the beneficiary after the certificate was issued or after the death of the first wife. That which we have quoted at the foot of the certificate was the designation made at that time. It was 'Mrs. H. M. Case, or lawful heirs,' meaning Mrs. H. M. Case, or in case she was unable to take by reason of death or other disability, his lawful heir should become the beneficiary. It is now contended that Mrs. H. M. Case was the name of the defendant, his widow, and that consequently she is the beneficiary named in the certificate. . . . . We cannot assume that he then contemplated the death of his

[53] Fischer v. American Legion of Honor, 168 Pa. St. 279; 31 Atl. Rep. 1089.

[54] Masonic M. R. Assn. v. McAuley, 2 Mackey (D. C.), 70.

[55] Day v. Case, 43 Hun (N. Y.), 179.

wife and his subsequent marriage to the defendant in this action." There is certainly much to be said on both sides of this case, and the reasons presented by the court are certainly strong ones. We cannot, however, pass over this decision without comment. The object of these societies is to primarily provide for the widow of the member, and the contract should be construed with this fact in mind. In this instance, the widow was Mrs. H. M. Case, so designated, who survived the insured, differing from the designation in a Wisconsin case, where the beneficiary was named Ida B. Peck, who was the wife.[56] But the court says that it cannot construe it as meaning " one person at one time and another at another," ignoring the fact that "Mrs. H. M. Case" must have always been the one person who was the lawful wife. Suppose if, after his second marriage, the insured had written exactly the same provision in the policy, in such a case would not the widow without doubt have been entitled to the fund? And it is noteworthy that it does not appear that there was any requirement whatever as to the manner or mode of changing the designation, from which it may fairly be presumed that assured was justified in letting the designation, "Mrs. H. M. Case," stand as it was. Again, the courts hold that contracts of this kind are very similar to a will, and should be construed as much in accordance with the rules governing wills as possible. Now, the question arises, Did not the member, by leaving the designation as it was, and by not changing the beneficiary, mean that his second wife should be entitled to the fund? A will speaks from the death of the testator. There certainly was a " Mrs. H. M. Case" at that time, and it would seem that, in accordance with this rule, there being a person to whom the description was then applicable she would be entitled to the fund. We cannot but believe that in this case, as in all others of a similar nature, the primary object of the member is to provide for his widow. We do not consider the fact that the insured could not reasonably have contemplated his second marriage at the time of the issuance of certificate to be of weight. The fact that the in-

[56] Farr v. Grand Lodge A. O. U. W., 83 Wis. 446.

sured did subsequently marry, and then permit his former designation to stand payable to "Mrs. H. M. Case," seems to clearly evidence an intent that she should take the fund. In construing these words the primary object of the society, the wording of the certificate, and the intent of the member all seem to reasonably point to Mrs. H. M. Case, the widow, as the beneficiary.[57]

§ 831. Where Death of Beneficiary Occurs after That of Insured but Before Payment of Fund.—The interest of the beneficiary in a mutual benefit certificate becomes a vested one immediately upon the death of the member to whom the certificate is issued, and in case of the death of the beneficiary after that of the insured, but before the payment of the proceeds of the certificate, the fund will go to the personal representatives of the beneficiary. Thus, where a member of a society provided in his certificate for the payment of the proceeds to his wife, and in case of her death to his children, it was held, her death having occurred shortly after his, and before payment of the fund, that the proceeds would go to her administrator.[58]

§ 832. Death of Beneficiary and Insured—Common Disaster.—In a case which arose in Massachusetts,[59] where a person insured in a mutual benefit society designated his wife as beneficiary, making the policy payable to "her or her assigns," but providing that in case of her death before his the proceeds should be paid to their children, the question arose whether her heir or his was entitled to the fund, the insured, his wife or children, having all perished together; and it was held that by the terms of the policy the wife's interest was contingent upon her surviving her husband, and, as they both died by a common disaster, his heirs, and not hers, were entitled to the proceeds. It will be seen that her interest was merely a contingent one. If, however, it had been a vested

[57] See Phelan v. Phelan (La. Par. Orl. Ct. App. 1891), 21 Ins. L. J. 93. Sec. 808, herein.

[58] Chartrand v. Brace, 16 Colo. 19.

[59] Fuller v. Linzee, 135 Mass. 468.

one, a different decision would probably have been given.[60] Another case involving this point also arose in Texas.[61] A member of a mutual benefit society designated his wife as beneficiary. The by-laws provided as follows: "Should all the beneficiaries die before the decease of the member, and no other or further disposition be made thereof, the benefit shall be paid to the heirs of the deceased member dependent upon him." Both the husband and wife perished in a common disaster. In an action to determine whether her administrator or his sister's were entitled to the fund, it was held that the finding of the court that they both died at the same instant must be considered as correct, and having so died, it would render the beneficiaries' estate as incapable of taking the fund as if the beneficiary had only died; consequently, his heirs should recover.

§ **833. Where Beneficiary Kills Insured.**—If a person who is designated as beneficiary in a policy of life insurance murders the insured, or feloniously causes his death, this will prevent any recovery by him. It would be contrary to public policy to permit a person who has feloniously killed another to recover on a policy on such life, and this is true without regard to the fact whether it was thereby intended to realize the benefit or not.[62] This question arose in the Maybrick case,[62a] where a person insured his life, designating his wife as beneficiary. After the death of her husband, but before the trial of the case, she assigned her interest in the policy. The assignees of the policy and the executors of the deceased brought an action against the insurers to recover on the policy. It was held that the assignees could not recover for the reason above given. It was also held that the fact that the beneficiary did not

[60] The statute of incorporation, and there were also like provisions in the general laws of the state, authorized a married woman to insure her husband's life for her sole use, and provided that "in case of her surviving her husband, the money should be payable to her," etc., and the policy was evidently framed upon this provision of the act of incorporation.

[61] Paden v. Briscoe, 81 Tex. 503; 17 S. W. Rep. 42.

[62] Schreiner v. High Court etc., 35 Ill. App. 576.

[62a] Cleaver v. Mutual Fund L. Assn. (Eng. Q. B. 1891), 44 Alb. L. J. 382; 64 L. T. R. 220.

know of the existence of the policy would not take the case out of the rule above stated. In a subsequent trial of this action,[63] it was held that, as between his legal representatives and the company, there was no question of public policy, and they might recover, since the former designation had failed, because of the wrongful or felonious act of the beneficiary. In a case in the federal courts[64] it is also held that one who, after effecting for his own benefit insurance on another's life, murders him to obtain the insurance money, forfeits his right thereto; and it was also held that evidence in a suit on the policy that similar policies were obtained in other companies at about the same time was admissible.

§ **834. Killing Assured by Insane Beneficiary.**—If an insane beneficiary kills assured, this does not prevent a recovery by such beneficiary; even though the killing is under such circumstances as would be murder were the beneficiary sane, nevertheless his right of recovery is not defeated.[65]

[63] (Eng. C. A. 1892); 45 Alb. L. J. 257; L. R. Q. B. D. 1892, vol. 1, p. 147.

[64] New York M. L. Ins. Co. v. Armstrong, 117 U. S. 591.

[65] Holdom v. Ancient O. U. W., 159 Ill. 619, reversing Ancient O. U. W. v. Holdom, 51 Ill. App. 200. In this case the court, per Phillips, J., says: "In Kurrow v. Continental Ins. Co., 57 Wis. 56, in a clearly reasoned and well-considered opinion it is held that where there is nothing in the policy to the contrary, an insurer is not released from liability, because the property was burned by the insured while insane. The reason for such a rule is, that an insurance company for a consideration paid has assumed the risk of the property being destroyed by fire. That assumption of risk includes injuries to the property by fire, resulting from the negligence of the assured or his servants. It is also an assumption of all risk of the assured becoming a lunatic or insane, and destroying the insured property when in that condition, unless by the terms of the policy such liability is saved by an express exception. An insane person may be liable for burning the property of another, for the reason that where a loss must be borne by one of two innocent persons, it must fall on the one occasioning that loss; yet, the burning of his own insured property does not necessarily injure the insurance company if that company, for a sufficient valuable consideration, assumes the risk. That assumption of risk is a contract of the company for a consideration paid to it. On no consideration of policy or justice should it be relieved from its contract in the absence of fraud, malice, or design. These qualities cannot exist in the mind of an insane person. To hold that the in-

§ **835. Where Killing is Involuntary.**—If the killing by the beneficiary is involuntary, though done in the commission of an unlawful act, the intent to kill not existing, his right to the mortuary fund is not affected thereby.[66]

§ **836. Killing by Sane Assignee.**—Causing the death of assured by felonious means by a sane assignee of a life policy defeats a recovery by him.[67]

§ **837. Assignment by Beneficiary.**—As a general rule the beneficiary under a regular life policy may assign his interest in the same to some third party for a valuable con-

surance company should be relieved from liability, under such circumstances, would be to change the contract of the parties at the instance of one for his benefit, to the prejudice of the other, without his consent, and where there is no misrepresentation, mistake, or fraud, covin, design, or malice, such is not the law. A fire policy covers all losses or damage by fire, except such as are excepted by the terms of the policy, and such as are caused by the intended voluntary act, design, assent, or procurement of the assured. . . . . The policy is not vacated by reason of the suicide of the assured while in a state of temporary insanity. The proposition is so fully established and recognized that a citation of authorities to sustain it would be supererogation. Here again the reason of the rule is like that in case of fire insurance policies. The contract of the parties is to be construed as it has been made, and not to be changed at the request of one of the parties to it for that party's benefit, without the consent of the other, where there has been no fraud, mistake, misrepresentation, deceit, or other intentional wrong to induce the making thereof, or to accelerate the time of payment. These rules do no violence to what has been termed a maxim of the insurance law of all nations—i. e., that the assured cannot recover for loss produced by his own wrongful act (Thompson v. Hopper, 6 El. & Bl. 191), by which is meant an act intentionally wrongful. . . . We hold: where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy, nor bar his right to a recovery for the insurance money." In the case of Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. Annot. 564, there is a well-considered and exhaustive opinion by Ryan, C.

[66] Schreiner v. High Court etc., 35 Ill. App. 576.

[67] New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591; Prince of Wales Co. v. Palmer, 25 Beav. 605.

sideration, provided the transaction is not a mere wager,[68] and although the insured has power to change the beneficiary in a benefit certificate, yet the latter has an assignable interest therein.[69] So where a person insured his life for the benefit of his daughters, one of whom entered a home for incurables, and, in consideration of care and support, assigned to the home "all moneys, rights, credits, and effects now belonging to me, or to which I am in any way entitled," and this daughter having died before the father, it was held, upon the insured's death, that the home was entitled to her share in the hands of the trustee.[70]

§ 838. **Ratification by Beneficiary of Assignment.**—An agreement by the beneficiary, after having assigned the policy, to assist in the collection of the proceeds in consideration of a certain proportion of the same, is a ratification of the assignment.[71]

§ 839. **Assignment to Creditor.**—A member may assign his certificate to his creditor where the statute under which the society is organized and the constitution of the society fully empower the member to name as his beneficiary his legatee or devisee, without restriction. The mode of selection is a mere matter of form, and does not go to the substance of the right to select beneficiaries.[72]

§ 840. **Assignment of Endowment Policy—Wife as Beneficiary.**—An endowment policy is not assignable where the wife or her personal representatives are the beneficiaries.[73]

[68] Examine sec. 2334, herein.

[69] So held in Lawler v. National L. Assn. (N. Y. S. C. 1895), 31 N. Y. Supp. 875.

[70] Hewlett v. Home for Incurables Balt. City, 74 Md. 350; 24 Atl. Rep. 324.

[71] Jewelers' League v. De Forest, 80 Hun (N. Y.), 376; 61 N. Y. St. Rep. 827; 30 N. Y. Supp. 88.

[72] Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 629.

[73] So held in Brammer v. Cohen, 86 N. Y. 11; 62 How. (N. Y.) 170. As to assignment of policy to wife, see, also, Miller v. Campbell, 140 N. Y. 457; 55 N. Y. St. Rep. 787; 51 N. Y. St. Rep. 596; Barry v. Equitable L. Assur. Soc., 59 N. Y. 587; Brick v. Campbell, 122 N. Y. 337; Baron v. Brummer, 100 N. Y. 372.

If the statutes permit a married woman to insure her husband's life for her benefit, and to assign the same in case she has no children or issue thereof, a subsequent statute removing such restriction does enable her to assign an "endowment" policy where she had a son living at the time the last statute was enacted, and this even though he died shortly thereafter.[74]

§ **841. Assignment by Beneficiary of Life Policy to one Having no Insurable Interest.**—A person who effects a regular life insurance upon another's life, and is beneficiary therein, cannot, where he has no insurable interest in such life, recover in an action upon the policy. Therefore, it necessarily follows that such beneficiary cannot assign the policy to another who has no insurable interest in the life, since by such means the law as to wagering contracts would be avoided.[75] Where a policy was issued to a son upon the life of his father, and the son assigned the policy to one who had no insurable interest in the assured's life, it was held to be a mere wagering policy in the hands of the assignees, and where the proceeds had been paid to the assignee, the son was held entitled to recover them from him.[76] But a different rule obtains in the case where one obtains an insurance on his own life, designating another as the payee, so that a beneficiary of a life policy has such a vested interest that he may assign that interest even to a stranger, and the policy is not released from the assignment by the fact that the assignee recovers judgment against the beneficiary.[77] In another case A assigned a life policy to B, to secure a debt which A owed B. B assigned the policy to C

[74] Miller v. Campbell, 140 N. Y. 457; 35 N. E. Rep. 651; 55 N. Y. St. Rep. 789; under Laws N. Y. 1840, c. 80; Laws N. Y. 1873, c. 821; Laws N. Y. 1879, c. 248; Brick v. Campbell, 122 N. Y. 337.

[75] Examine secs. 914, 917, herein.

[76] Hoffman v. Hoke, 122 Pa. St. 377; 15 Atl. Rep. 437; 1 L. R. Annot. 229.

[77] So held in Dolen v. Metropolitan L. Ins. Co. (Ont. H. C. J. Q. B. D. 1895), 15 C. L. T. 38. Under Deering's Annot. Civ. Code Cal., sec. 2764, assignee of life policy need have no insurable interest. Where assignment to one having no insurable interest was held void, as not within the specified clauses, see Michigan Mut. B. Assn. v. Rolfe, 76 Mich. 146; 42 N. W. Rep. 1094. But see on same point Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584.

to secure a debt he owed C, and C assigned the debt of B to D, but neither B, C, nor D had any insurable interest in A's life. The insurer having paid the proceeds of the policy into court, it was held that, as between B and D, D was entitled to the fund.[78] It is held in Kansas that if a person is designated as a beneficiary in a life policy, and assigns the policy to a person having no insurable interest in the life of the insured, and the assignee, after the death of the insured, having learned that he could not recover, returned the policy to the beneficiaries, writing across the face of the policy the word "canceled," that there could be no recovery either by the assignee or by the beneficiaries.[79]

§ **842. Lien of Assignee on Paid-up Policy.**—A lien on a paid-up policy exists in favor of an assignee for value of the original policy who has paid the premium to prevent its lapsing.[80]

§ **843. Where Wife Joins in Assignment of Policy on Husband's Life.**—Where one procured an insurance upon his life, payable to his executors, for the benefit of his wife and children, and the wife joined in an assignment of the policy and died before her husband, it was held that her right vested on the issuance of the policy, and passed by the assignment to her assignee.[81]

§ **844. Same—Statute Forbidding Married Woman becoming Surety.**—Under a statute which forbids a married woman becoming surety for another's debt, the act of herself and husband in assigning a policy on his life for her benefit will not divest her interest, and a provision in the policy, permitting a balance of the year's premium and "all other in-

[78] Connecticut Mut. L. Ins. Co. v. Fisher (U. S. C. C. E. D. Mo. 1887), 30 Fed. Rep. 662.

[79] Missouri Val. L. Ins. Co. v. McCrum, 36 Kan. 146; 12 Pac. Rep. 517.

[80] Mandeville v. Kent, 88 Hun (N. Y.), 132; 34 N. Y. Supp. 622.

[81] Life Ins. Co. v. Baldwin, 15 R. I. 106; noted in Small v. Jose, 86 Me. 124; 29 Atl. Rep. 976.

debtedness" to be deducted, does not permit a subsequent loan of the company to be deducted from the insurance money due the wife.[82]

§ 845. **Assignment by Wife of Policy on Husband's Life.**—Although a policy may be assigned with the husband's written consent when payable to his wife for her use and benefit, under a statute permitting the same, as to all such policies "issued within the state," nevertheless the statute applies where a foreign company authorized to do business in the state makes a policy outside the state, but delivers it through its agent to the beneficiary, who with her husband is a resident of the state.[83] Although a life policy made under the statute for the benefit of the wife of insured provides that, in case of her death before her husband's, it shall go to the children, and although a statute authorizes a married woman, with her husband's written consent, to assign such policy, nevertheless she has no authority under the statute to assign an interest expressly reserved in the policy to her children.[84]

§ 846. **Classes Entitled to Benefit Fund—Control in Case of Assignment—Benefit Certificate.**—As a general rule, no assignment of a mutual benefit certificate can be made prior to the death of the member to any person who is not within the class limited by the statutory law or the law of the society.[85] Where, however, the

[82] Union Cent. L. Ins. Co. v. Wood, 11 Ind. App. 335; 37 N. E. Rep. 180; Rev. Stat. Ind. 1894, sec. 5964; Rev. Stat. 1881, sec. 5119, Davis, C. J., dissenting.

[83] Spencer v. Myers, 73 Hun (N. Y.), 274; 58 N. Y. St. Rep. 70; 26 N. Y. Supp. 371.

[84] Travelers' Ins. Co. v. Healey, 86 Hun (N. Y.), 524 (reversing judgment below), 60 N. Y. St. Rep. 151; 28 N. Y. Supp. 478. Wife and children, beneficiaries under policy taken out by her on his life, cannot assign it even with husband's consent, so as to affect her children's rights where she dies before him: Knickerbocker L. Ins. Co. v. Weitz, 99 Mass. 157. See Morris v. Massachusetts Mut. L. Ins. Co, 131 Mass. 294, 295. Assignee of policy, use of wife and children: Burroughs v. State Mut. L. Assn., 97 Mass. 359.

[85] Bayse v. Adams, 81 Ky. 368; American Legion of Honor v. Perry, 140 Mass. 580; Knights of Honor v. Nairn, 60 Mich. 44; Na-

by-laws prescribe certain classes from whom the beneficiary may be chosen, and the society, after issuance of the certificate consents to an assignment by the beneficiary to some person not within the classes specified, it is held that the society will be estopped to set up in defense to an action on the certificate the fact that the assignee is not of the classes designated in the by-laws.[86]

§ 847. **Effect of Provision Permitting Assignment.**— In a case which arose in Kentucky[87] upon a mutual benefit certificate, which contained a provision permitting the assignment of the same, it appeared that the member had assigned the certificate in payment for a certain piece of land. The person to whom it was assigned retained it for about ten years, and then, without offering to return the certificate, and after having permitted it to lapse, brought an action to set aside the contract, claiming that the member had no right to assign the certificate. The court held that there was an express provision permitting an assignment, and that the action could not be sustained under the facts of the case; and that it was even doubtful whether the company could set up such a defense where it has expressly conferred the right to assign; that even if it could, however, and had not done so, the assignee would have no right to avail himself of this fact.[88]

§ 848. **Beneficiary Charged with Notice of Contents of Policy.**— The beneficiary under a policy of life insurance is held to be chargeable with notice of the contents of the same. So where a policy which was payable to the wife of the insured provided that it was not to be additional to a former policy payable to her, but was intended to increase the former insurance to the amount named in the latter policy

tional Mut. Aid Assn. v. Gonser, 43 Ohio St. 1. See sec. 2334, herein, as to assignment of mutual benefit certificate.

[86] Smith v. People's Mut. B. Soc., 64 Hun (N. Y.), 534; 46 N. Y. St. Rep. 10; 19 N. Y. Supp. 432.

[87] Jackson v. Anderson (Ky.), 3, S. W. Rep. 326.

[88] See section in this chapter on waiver by society.

it was held that if she accepted the benefits of the latter policy she could not recover on the former.[89]

§ 849. Possession by Beneficiary of Mutual Benefit Certificate.[90]—In some of the cases which have been before the courts involving the right of the member of a mutual benefit society to change the beneficiary named in the certificate, it has been a question whether the member has the right to change the beneficiary where the latter has retained the possession of the certificate; the ground of the decision in these cases resting upon the point whether the beneficiary has vested rights, since there has been no executed settlement in his favor.[91] From these decisions the doctrine might possibly arise by implication that if the beneficiary retains possession of the certificate, there can be no subsequent change in the designation without his consent, and the words of the court in a New York case[92] apparently sustain such a rule. The court said: "Conceding that Phillip intended at first that she receive the insurance money, he had a right to change the direction in which the money would go at any time before he had actually placed in her hands, or beyond his own control, the means of enforcing her claim to the money." [93] Later cases, however, do not uphold such a doctrine as might be deduced from the foregoing decisions. In a recent case in Iowa[94] it was held that though a member procured the certificate from the original beneficiary by fraud, and obtained a new one designating a new beneficiary, the former beneficiary had no remedy. The court, per Granger, J., said: Whatever consequences should attach to the fraud-

[89] Wheeler v. Odd Fellows' Mut. Aid etc. Assn., 44 Minn. 513; 47 N. W. Rep. 149.

[90] See sec. 743, herein.

[91] Brown v. Grand Lodge A. O. U. W., 80 Iowa, 287; 45 N. W. Rep. 884; Durian v. Grand Verein, 7 Daly (N. Y.), 168.

[92] Durian v. Grand Verein, 7 Daly (N. Y.), 170. In this case the insured retained possession of the certificate, so that the opinion upon the point as stated in the text is not entitled to great weight as sustaining such a rule.

[93] See Lemon v. Phœnix Mut. L. Ins. Co., 38 Conn. 301.

[94] Brown v. Grand Lodge A. O. U. W., 80 Iowa, 287 (permission to change beneficiary in this case was allowed by statute).

ulent acquirement of the certificate, it could not have the effect of creating a vested right where none existed before. If the plaintiff, with the possession of the certificate, had no such right therein as would defeat the right of her father to change the beneficiary, she had no such right as would justify her retention of it if he demanded it for that purpose." Again, in Pennsylvania,[95] where a wife in her certificate designated her husband as beneficiary, it was held that though the premiums or assessments might be paid by the beneficiary, yet this did not so operate as to deprive the insured member of the right to subsequently designate a new beneficiary. In this case the court said: "Notwithstanding the fact that the certificate was delivered to the plaintiff, and the assessments thereon were paid by him, his wife had the right on presenting it to the supreme secretary, to apply for and effect a change in the designation of he beneficiary named therein. . . . . When plaintiff accepted the original certificate, and paid the assessments thereon, he knew, or should have known, that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death." In Hirschl v. Clark,[96] where a certificate had been issued to a member, in pursuance of his application, which directed payment to his wife, subject to such future disposal as he might thereafter direct, and the certificate had been delivered to the wife, who retained possession of the same and refused to deliver it, it was held that the member might by a writing surrender the certificate, and direct the issuance of a new one payable to new beneficiaries.[97] In another case which arose in Texas,[98] where the question of the effect of a gift of the certificate was considered, it was also held that the beneficiary acquired no vested rights by the possession of the certificate. In this case it appeared that a member had designated his wife as beneficiary, and delivered possession of the certificate to her, and, after retaining it about a year, she delivered it to a third person for

[95] Fisk v. Equitable Aid Union (Pa. 1887). 11 Atl. Rep. 84.

[96] 81 Iowa, 200; 9 L. R. Annot. 841; 47 N. W. Rep. 78.

[97] See, also, Nally v. Nally, 74 Ga. 669; Glanz v. Gloeckler, 104 Ill. 573.

[98] Byrne v. Casey, 70 Tex. 247; 8 S. W. Rep. 38.

safekeeping. The insured, without the consent of the wife, procured the certificate, surrendered the same, and obtained another naming new beneficiaries. When the first certificate was issued, the member was, by the laws of the society, given the right to change the beneficiary with "the consent of his beneficiary indorsed thereon," but subsequently the provision as to the consent of the beneficiary was annulled. From these cases it will be seen that the rule as sustained by the weight of authority is this, that although the beneficiary under a mutual benefit certificate may have possession of the certificate, yet this does not of itself vest him with such a right in and to the same as will prevent the member from exercising the right of substituting another beneficiary, who will be entitled to the fund. In all these cases, however, it will be observed that the member was expressly allowed, either by the charter or by-laws or by statute, to designate a new beneficiary. If there were no such provision, and the member had delivered the certificate to the beneficiary, the question might arise whether the member could change the beneficiary, or whether the latter's interest had in such case become a vested one. The opinion in Brown v. Grand Lodge[99] is pertinent in this connection. The court said: "A part of section 7, chapter 65, of the Acts of the Twenty-first General Assembly, is in these words: 'Any member of any corporation, association, or society operating under this act shall have the right at any time, with the consent of such corporation, association, or society, to make a change in his beneficiary, without requiring the consent of such beneficiary.' The act is one for the regulation of mutual benefit associations, and controls as to such changes on the part of the association. It clearly authorizes such changes without the consent of the beneficiary. Appellant does not in argument question the validity of this statute, and we must not in any sense be understood as holding that such a statute could operate to impair vested rights. We have cited it in connection with authorities holding that such beneficiaries have no vested rights." A delivery of the certificate by the member to the beneficiary is not necessary to complete the appointment. Any designa-

[99] 80 Iowa, 287.

tion not in violation of the terms of the certificate or of the laws of the organization will be sufficient to enable the beneficiary to recover on the certificate, though the member retains possession of the same.[100]

§ 850. Beneficiary may be Trustee of Fund though not so Designated.—Though the person named as beneficiary may not be designated as a trustee, yet circumstances may be such that he will be so held. Thus, where a person, who took out a policy of life insurance upon his own life, designated his mother as beneficiary, she paying the first premium, and subsequently designated his wife as beneficiary, it was held that, in the absence of any power of revocation being reserved to the insured, no valid transfer could be made to the wife entitling her to the proceeds in her own right without the consent of the mother, and that a trust had been created in favor of the latter.[101] Where a person advanced money for the payment of premiums upon another's insurance policy, under an agreement that the policy should be held as security for such advances, it was decided that the designation of the wife of such person as beneficiary, upon the assurance of the husband that this was done in order to render the security more effectual, would give her no beneficial interest, except as trustee, for the amount which had been advanced by the husband.[102]

§ 851. Where Policy Provides Payment to Insured if he Lives to Certain Date—If not to Beneficiary Designated.—If a policy of insurance provides that the proceeds shall be payable to the assured if he lives to a certain date, and in case of his death before that date then they shall be payable to the beneficiary designated, the interest of the beneficiary is a contingent one, and the benefit of the policy will only inure to such beneficiary in case the assured dies before the end of the period designated in the policy.[103] So

[100] Highland v. Highland, 13 Ill. App. 510.

[101] Pingrey v. National L. Ins. Co., 144 Mass. 374; 11 N. E. Rep. 562.

[102] McDonald v. Humphries, 56 Ark. 63; 19 S. W. Rep. 234.

[103] Levy v. Hagen, 69 Ala. 17.

where a policy of life insurance assured the life of a husband, "for the sole use and benefit of" M. B., his wife, in "the sum of one thousand dollars, for the term of ten years from date . . . . and the said company doth hereby promise and agree to pay the said sum assured at its office to said person whose life is assured, or assigns, in ten years from the date hereof, viz., the year when the said person shall have attained the age of fifty-five years, or, in case of the previous death of the person whose life is insured, to the said beneficiary's assigns in sixty days after due notice and proof of such death," and the husband did not die within the ten years, it was held that the wife could not recover the one thousand dollars since the policy inuerd to her only in case the husband died within the term, leaving her surviving.[104] If a policy is made payable at a certain time to assured, if living, and if not, to a certain person, as trustee for a third party, and such third person dies, it is held that there will be a resulting trust in favor of the insured, and the proceeds of the policy will become a part of his estate.[105]

§ 852. **Maturity of Policy when Beneficiary Certain Age—Debt of Association.**—In a mutual endowment association, depending upon assessments of members for a fund for the payment of policies, if said policies mature when the beneficiary reaches a certain age, the specified age must be reached before the policies can mature, so as to become debts of the association, and this conclusion is unaltered by the fact that all dues and assessments required of the holders have been paid before that period.[106]

§ 853. **Policy Cannot be Surrendered without Consent of Beneficiary in Life Policy.**—Since the interest of the beneficiary in a life policy is a vested one, the insured cannot surrender the policy, nor defeat the beneficiary's right

[104] Tennes v. Northwestern Mut. L. Ins. Co., 26 Minn. 271.

[105] Bancroft v. Russell, 157 Mass. 47; 31 N. E. Rep. 710. See secs. 828-832, herein, as to death of beneficiary.

[106] So held in Gray v. Merriman (Minn. 1894), 23 Ins. L. J. 765; 57 N. W. Rep. 463.

therein, without the latter's consent.[107] Thus, where a person has taken out a policy upon his life, designating his wife as beneficiary, he cannot surrender the policy without her knowledge and consent so as to defeat her right,[108] and a surrender of the policy without her consent would be of no effect, but the wife might avail herself, if she so desired, of the benefits or proceeds of the new or substituted policy.[109]

§ 854. Surrender of Policy Avoided for Mental Incapacity.—If the surrender of a benefit certificate may be avoided by a member on the ground of mental incapacity, the beneficiary may, upon the member's death, avoid the surrender upon the same grounds.[110]

§ 855. Minor Children Beneficiaries—Consent to Surrender Policy by Insured not Binding.—Minor children who are designated as beneficiaries under a life policy have a vested interest therein, and consent given by them to a surrender of a policy or policies in which they are so designated and the issuance of new ones under different conditions, will not be binding upon them. Thus, in a federal case A took out three endowment policies upon his life for equal amounts, payable one to each of his three daughters. He afterward exchanged these policies for paid-up ones. These policies were for unequal amounts, owing to the way in which payments had been applied. His three daughters, who were minors, consented before the exchange of policies that the proceeds of all should be held by a trustee for all in equal shares. It was decided that the daughters, being minors, were not bound by the arrangement, and that one of them, after attaining full age, could demand

[107] Whitehead v. New York L. Ins. Co., 102 N. Y. 143; 33 Hun (N. Y.), 425; 63 How. Pr. (N. Y.) 394; Foley v. Mutual L. Ins. Co., 138 N. Y. 333; 64 Hun (N. Y.) 63; 45 N. Y. St. Rep. 918; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

[108] Matters of Booth, 11 E. B. D. N. C. 145.

[109] Barry v. Brune, 71 N. Y. 261. See, also, Chapin v. Fellowes, 36 Conn. 132; People v. Globe Mut. Ins. Co., 15 Abb. N. C. (N. Y.) 75; Timayenus v. Union M. F. Ins. Co., 22 Blatchf. (C. C.) 405; Singer v. Charter Oak Ins. Co., 22 Fed. Rep. 774.

[110] Wells v. Covenant Mut. B. Assn. (Mo. 1895), 29 S. W. Rep. 607.

the proceeds of the paid-up policy that was substituted for the policy taken out in her name, although the amount was greater than one-third of the sum of all the policies, and that her rights were vested.[111]

§ 856. Policy to Wife and Children—Death of Wife—Executor has no Power to Surrender Policy.—If a policy is issued payable to the wife and children, and the wife dies before the insured, her executor has no power to surrender the policy. So where a husband assigned a policy on his life to his wife and infant children, and upon her death before his she appointed him as the executor of her will and guardian of her children, and he, having procured letters testamentary but no letters of guardianship, surrendered the policy, it was held that mere acquiescence of one of the children after he became of age would not constitute a ratification by such child of the surrender of the policy.[112]

§ 857. "Wife and Children"—"Wife" Deceased at Time of Issuance—Paid-up Policy.—In a North Carolina case a life policy was issued, payable at the death of insured, to "his wife and children," without other designation. He surrendered this policy and took a paid-up policy for the benefit of the beneficiaries, and also another policy in the same company similar to the one surrendered, and for the benefit of "his wife and children," although when the last policy was issued the wife was dead. In such case the last policy does not continue in force the one it superseded, and it should be construed in accordance with the then existing conditions giving the entire fund to the surviving child and the administrator of the deceased one, the provision for the deceased wife being nugatory and unavailing.[113]

§ 858. Rights of Creditors of Insured—Regular Life Policy.—There are, in many states, statutes which

[111] Brockhaus v. Kenna, 10 Biss. (C. C.) 338; 7 Fed. Rep. 609.

[112] Foley v. Mutual L. Ins. Co., 138 N. Y. 333; 64 Hun (N. Y.), 163; 45 N. Y. St. Rep. 918.

[113] Hooker v. Sugg, 102 N. C. 115; 11 Am. St. Rep. 717.

permit a married woman to take out a policy of insurance upon the life of her husband for some definite period, or for the term of his natural life.[114] In such case she may recover the full amount of the policy where she survives her husband, and it will be free from the claims of her husband's creditors.[115] In several states there are also statutes which provide that a person may insure his life, and make the policy payable to his beneficiary or to his wife and children, the insurance money being free from the claims of his creditors, or, as in some states, exempt from such claims of creditors, subject to certain limitations.[116] Under such a provision exempting the proceeds from all claims of creditors of the insured, the insurance money will be exempt, even though the insured may have been insolvent when he effected the insurance and the premiums were all paid by him.[117] Under the Massachusetts statutes[118] a member of a society cannot designate a mere creditor as beneficiary. This statute has not been changed in this respect by subsequent legislation.[119] In a case which arose in Iowa,[120] where a certificate had been made payable to the insured, "his executors, administrators, and assigns," it was held that under the statute of that state the proceeds of the policy were payable to the widow of the deceased, free from all claims of creditors of the insured. In a recent case in Nebraska[121] it was held that while ordi-

[114] See statutes cited in sec. 879, herein. Examine Mutual B. Ins. Co. v. Wise, 34 Md. 582; Earnshaw v. Stewart, 64 Md. 514; Elliott v. Bryan, 64 Md. 368; Mutual L. Ins. Co. v. Stibbe, 46 Md. 312; and examine cases in next note.

[115] Examine Pingee v. Jones, 80 Ill. 177; Smedley v. Felt, 43 Iowa, 607; Jacobs v. Continental Ins. Co., 1 Cin. Sup. Ct. Rep. 519; Ely v. Ely, 80 Ill. 532; Murray v. Wells, 53 Iowa, 256; In re Conrad's Estate, 89 Iowa, 396; 56 N. W. Rep. 535; Yale v. McLaurin, 66 Miss. 461; Beam v. Beam, 24 Ont. Rep. 189; 13 C. L. T. 434; Brethren Mut. Aid Soc. v. Grove (Pa.), 6 Week. Not. Cas. 328; Friedlander v. Mahoney, 31 Iowa, 311; People v. Phelps, 78 Ill. 147.

[116] See statutes cited in sec. 879, herein.

[117] Central Nat. Bank v. Hume, 128 U. S. 195; 9 S. C. Rep. 41; reversing 3 Mackey (D. C.), 360; 51 Am. Rep. 780; Harvey v. Harrison, 89 Tex. 470; 14 S. W. Rep. 1083.

[118] Pub. Stat., c. 115, sec. 8, amended by Stat. 1882, c. 195, sec. 2.

[119] Clark v. Swartzenberg, 162 Mass. 98; 38 N. E. Rep. 17.

[120] Rhode v. Bank, 52 Iowa, 375.

[121] Talcott v. Fields, 34 Neb. 611; 52 N. W. Rep. 400; 46 Alb. L. J. 63.

narily the proceeds of a policy upon the husband's life, payable to the wife, were not to be applied in payment of his debts, yet a different rule prevailed in the case of an endowment policy, since a policy which provides for the repayment of a certain sum in a certain number of years was held to be in the nature of a loan, and the insurance a mere incident. And where the insolvent debtor had paid the premiums, it was declared that although the amount was paid during the lifetime of the insured, the proceeds were not the wife's absolutely, but were subject to the claims of the creditors of the husband. In another case it was held that where one was in debt, and insured his life for the benefit of his wife and children, carrying the premiums himself, his children were entitled after his death to have deducted and paid to them from the insurance the amount thus expended in the payment of premiums.[122] And in a case in Alabama[123] it was held that where a father procured a policy, payable to his minor son, the premiums being paid by the father, it would be void as to his creditors, and the son would be regarded as trustee for them. The true rule, however, seems to be, that in the absence of any statute or of any attempt to defraud the creditors of the insured, the latter could only recover from the proceeds of a regular life policy the amount of the premiums paid.[124] A testator declares his insurance for the benefit of his wife and children, so that the fund is exempt from creditors, where his expressed purpose is the payment by his executors of the interest on the fund to his wife for the education and maintenance of his children, even though the principal is to be divided equally between the children upon their majority, in case his wife marries again.[125] In many states the statutes provide that a person may insure his life for the benefit of his wife and children, and limit the amount which the insured may annually expend in premiums for that purpose. Under such statutes, though the debtor

[122] Stigler v. Stigler, 77 Va. 163.

[123] Fearn v. Ward, 80 Ala. 555; 2 S. Rep. 114.

[124] See statutes under first note in this section.

[125] Beam v. Beam (Ont. S. C. J. Ch. D. 1893), 13 Can. L. T. 434.

might be insolvent, the creditors should only be entitled to recover from the proceeds of the policies any excess paid for premiums over the amount limited by statute.[126] Where a policy of insurance on the life of B. was made payable to M., who held it for the benefit of a creditor of the insured, although without the knowledge of the creditor, B. having died, it was held that an action lay against M. by the creditor for so much of the proceeds of the policy as would satisfy the debt.[127] In another case a life insurance policy stated that the premiums were paid by the wife of the insured, and in fact they were paid by the insured for his creditors, and it was held that the wife had no title in the proceeds of the policy, it not being expressed to have been made for her benefit.[128] The mortgagee of a life insurance policy can only retain the amount of his debt with interest, and the premium paid, where the mortgagor has retained the right of redemption.[129]

§ 859. Rights of Creditors of Members—Benefit Societies.—As a general rule, the fund payable on the death of a member of associations of this character to persons designated by him is not a part of his estate, subject to his debts, but should be paid directly to the beneficiaries, and does not go to the administrator, and the personal representatives cannot sustain an action for the fund.[130] And though the proceeds of a mutual benefit certificate may come into the hands of the executor of the insured, they will be presumed to belong to his

[126] Stone v. Knickerbocker L. Ins. Co., 52 Ala. 589; Cole v. Marple, 98 Ill. 58; Pence v. Makepeace, 65 Ind. 345; Ætna Nat. Bank v. United States L. Ins. Co., 24 Fed. Rep. 770.

[127] Hutchings v. Miner, 46 N. Y. 456; 7 Am. Rep. 369.

[128] Connecticut Mut. L. Ins. v. Ryan, 8 Mo. App. 535.

[129] King v. Van Vleck, 109 N. Y. 363; 12 Cent. Rep. 311; 16 N. E. Rep. 547.

[130] Swift v. San Francisco S. & Ex. Board, 67 Cal. 567, 574, per McKee, J., citing C. M. Ben. Assn. v. Priest, 46 Mich. 429; Ballou v. Gile, 50 Wis. 614; Vollman's Appeal, 92 Pa. St. 50; Masonic Mut. L. Ins. Co. v. Miller, 13 Bush (Ky.), 489; Arthur v. Odd Fellows, 29 Ohio St. 557; Maryland M. B. Soc. of Imp. O. of R. M. v. Clendinnen, 44 Md. 429. Proceeds of life policy are declared assets of estate in Kelley v. Mann, 56 Iowa, 625.

family in preference to his creditors.[131] As a general rule, also, a creditor will be excluded if the statutes under which the society is organized or the charter of the society prescribes certain classes from which the beneficiary shall be chosen, or provides that the fund shall be payable to certain classes. Thus, where a statute authorized benefit societies to issue certifictaes for the benefit of the widows, orphans, or dependents of members, a designation of the creditor of the insured was held invalid,[132] and a promise by the society to pay the money due on a certificate in such a case to a creditor of the member will be void.[133] So the right of a member of a society organized under the New York laws of 1879 [134] is held not be a property right; nor can he impress it with a trust for the payment of his debts.[135] Where a benefit certificate, in which the member's wife is designated as beneficiary, was permitted to lapse, and the member subsequently renewed it for the benefit of one of his creditors, and in the latter's name, it was held that the creditor could only hold the amount of the debt at the time of the renewal of the certificate, together with the assessments which he had paid, and could not deduct the amount of other claims which had subsequently accrued, and that representatives of the member would be entitled to the surplus.[136] In the case of a beneficiary claiming as a creditor of the insured, a demurrer to his petition by the widow, alleging that the notes held by the beneficiary were executed for gambling debts, was held to be improperly sustained.[137]

§ 860. Rights of Creditors of Wife when Beneficiary. The proceeds of a policy of life insurance, in which the wife of the insured is designated as beneficiary, will not be exempt

[131] Re Palmer, 3 Dem. (N. Y.) 129.

[132] Rindge v. New England Mut. Aid Soc. (Mass.), 15 N. E. Rep. 628.

[133] Skillings v. Massachusetts B. Soc., 146 Mass. 286; 3 Mass. (L. ed.) 98; 5 N. E. Rep. 718.

[134] Chapter 189.

[135] Boasberg v. Cronan, 30 N. Y. St. Rep. 483.

[136] Levy v. Taylor, 66 Tex. 652; 1 S. W. Rep. 900.

[137] Weigelman v. Bronger, 96 Ky. 132; 28 S. W. Rep. 334; 16 Ky. L. Rep. 401.

from the claims of her creditors.[138] But where the policy was issued for the benefit of the wife and children, it was held that the creditors of the wife had no claim upon the proceeds.[139] If a husband procures a policy on his life payable to his representatives, and subsequently assigns the policy to his wife, who, with intent to defraud her creditors, assigns it to her children, it is held that her creditors may recover from her children the surrender value of the policy at the time of the assignment.[140]

§ 861. Creditor as Payee in Policy on Debtor's Life. A creditor has an insurable interest in the life of his debtor,[141] and may be the beneficiary in a regular life insurance policy upon the debtor's life. And in those cases where neither the statute under which a benefit society is formed, nor the charter or by-laws of the society limit the classes from which the beneficiary may be chosen, a member may designate his creditor as beneficiary, and he will be entitled to the proceeds of the certificate. The general rule, however, in these cases is, that the creditor may, where he pays the premiums or assessments, retain any excess over the amount of his debt, provided there is not such an excess as will render the whole transaction merely a wagering one.[142] Where a person took out a benefit certificate, amounting to six thousand five hundred dollars, on the life of his debtor who owed him one thousand dollars, and paid all dues and assessments, it was held that, as the amount to be realized on the certificate depended on the number and solvency of the members, and as only two thousand one hundred and twenty-four dollars and eighty-two cents was realized, the creditor might retain the balance over the amount of the debt,

[138] Murray v. Wells, 53 Iowa, 256; Wellington v. Fox, 13 N. Y. Supp. 334.

[139] Leonard v. Clinton, 26 Hun (N. Y.), 288. See Commercial Trav. Assn. v. Newkirk, 16 N. Y. Supp. 177; Bolt v. Keyhoe, 30 Hun (N. Y.), 619; Barron v. Brummer, 100 N. Y. 372; Brummer v. Cohn, 86 N. Y. 11; Baltimore & Ohio R. R. Co. v. Arthur, 90 N. Y. 234; Smilie v. Quinn, 90 N. Y. 492.

[140] Leonard v. Clinton, 26 Hun (N. Y.), 288. Examine cases in preceding note. When wife's creditors have no claim on money: In re Conrad's Estate, 89 Iowa, 396; 56 N. W. Rep. 535.

[141] See chapters on insurable interest, herein.

[142] See sec. 954, herein.

interest, and expenses.[143] In a recent case in England[144] the trustees of an insurance company advanced ten thousand pounds to a person upon the latter's interest in the estate of his father, which interest was contingent upon his surviving his father. The borrower insured his life for thirty-four thousand four hundred pounds. By the agreement forming a part of the transaction the policy was to belong absolutely to the trustees, in case he died before his father and had not paid the amount due the trustees; but in case he paid the debt, the trustees were to assign the policy to him. The insured died before his father without having paid anything upon the debt. In an action by the representative of the deceased, it was held that the insurance was not merely for the sole benefit and protection of the trustees, but that the transaction amounted to a mortgage of the policy to the trustees, and was the property of the insured, subject to the charge or mortgage, and that in accordance with the equitable doctrine against fettering the mortgagor's rights of redemption, the representatives of the insured were entitled to the surplus in excess of the amount due the trustees. If the statute under which a society is formed does not permit the issuance of certificates to a member payable to his creditor, the subsequent enactment of a law enabling benefit societies to issue such certificates will not render a certificate issued prior to the enabling act, to a member designating his creditor as beneficiary, enforceable in the hands of the creditor, where it does not appear that subsequent to the enactment of the law the society had done anything rendering the contract enforceable by the creditor.[145]

§ 862. Society not Bound by Secret Agreements by Member with Children as Beneficiaries.—A society or a grand lodge, bound by the terms of a contract with a member to pay a fund on his death to his wife and children, can take no notice of secret arrangements or settlements made by the mem-

[143] Rittler v. Smith, 70 Md. 261; 16 Atl. Rep. 890.

[144] Salt v. Northampton, L. R. App. Cas. 1892 (one judge dissenting).

[145] Skilligs v. Massachusetts B. Assn., 146 Mass. 217; 15 N. E. Rep. 566.

ber, which, if recognized, would deprive such child of its share.[146]

§ 863. **Where Bequest by Wife will not Pass Interest in Policy on Husband's Life.**—A bequest by a wife to her husband of all the personal property in the dwelling-house and other buildings on certain lots which are also devised, and of all her interest in their community property, does not pass her right in a policy on the husband's life, made payable on his death to her and to her executors, administrators, or assigns.[147]

§ 864. **Tontine Policy—When Beneficiary not Bound by Action of Company's Officers.**—If a tontine policy is issued by a stock company, it is held that the beneficiary of such policy is not bound by the action of the company's officers in fixing the profits which have been apportioned among the policies, upon the theory that the apportionment is a dividend, in the sense in which that word is used as applied to a stockholder, but that the insured having complied with his contract on his own behalf, and made required payments, was entitled to have apportioned to him his share of a fund to be computed, and that defendant had no right to withhold it as profits from a stockholder, and that the share or its equivalent in value, was the plaintiff's own property, and not that of the defendant company, and that the latter could not hold such surplus or profits as a trust.[148]

§ 865. **Suspension of Member—Right of Beneficiary to Recover.**—In many cases a benefit fund is only payable in case of the death of the member while in good standing. Where there is such a provision there can be no recovery if it appears that the member was not "in good standing" at the time of his death. Thus, where a member did not appeal from a suspension by the society, as he was entitled to do under its

[146] Felix v. Grand Lodge A. O. U. W., 31 Kan. 81, Brewer, J., dissenting.

[147] Evans v. Oppermann, 76 Tex. 293; 13 S. W. Rep. 312.

[148] Pierce v. Equitable L. Assur. Co., 145 Mass. 512; 12 N. E. Rep. 858.

constitution, it was held that the beneficiary could not recover, as the member was not in "good standing" at the time of his death.[149]

§ 866. Funeral Benefits—Who Entitled.—Where the charter of a benefit society stated its purpose to be the accumulation of a fund to be paid to the representatives of the member, and the constitution declared its object to be to provide for the "family or heirs" of members, and also that the "heirs, in case there is no family," should receive the funeral benefit, and further provided that "those persons who are legally entitled to receive the funeral benefit" should notify the society, it was held that the executor was entitled to an amount out of the benefit fund sufficient to pay the expenses of the funeral.[150]

§ 867. Beneficiary—Benefits Payable in Case of Sickness or Disability—Insanity of Member.—Where the laws of the society provide that if the insured member is unable, through "sickness or other disability," to earn a livelihood for himself and family, he shall be entitled to certain benefits, the insanity of a member will bring him within the meaning of such provision, and entitle him to recover.[151]

§ 868. Railroad Relief Association—Provision as to Release of Company for Damages—When Beneficiary may not Recover.—A member of a railroad relief association for employees, to which the company contributes funds, may validly agree that the acceptance of benefits from the relief fund shall operate as a release from all claims for damages against the company. Such agreement is not contrary to public policy, nor against the rule that a common carrier cannot contract against his own negligence.[152] And where the consti-

[149] Karcher v. Supreme L. K. of H., 137 Mass. 368.

[150] Oelsen v. Schiller D. B. Soc. (Pa. 1892), 9 Lanc. 113. See section herein on "widow and relatives."

[151] McCullough v. Expressmen's Assn., 133 Pa. St. 142; 7 L. R. Annot. 210; 47 Phil. Leg. Int. 179; 19 Atl. Rep. 355.

[152] Johnson v. Philadelphia etc. R. R. Co., 163 Pa. St. 127; affirming 2 Dist. Rep. 229; 29 Atl. Rep. 854. See, also, Ringle v. Pennsylvania R. R. Co., 164 Pa. St. 529. Contract that acceptance operates as re-

tution of a railroad relief association provides that the company must be released from any and all liability for damages before the benefit will be paid, the recovery of damages, in an action against the company by those legally entitled to damages, will defeat the right of a third person named as beneficiary to recover the benefit fund. This was so held where a person designated his mother as beneficiary, and upon his death his wife and a minor child, the persons legally entitled to damages did not release the railroad company, but brought an action and recovered damages by compromise.[153] In another case, where a railway relief association was organized for the purpose of giving aid in case of injury or sickness to its members, the following facts appeared: The funds were realized from contribution from the members, with an agreement upon the part of the railway company that in case of a deficiency it would contribute the amount necessary to make up such deficiency. The company was, however, seldom liable to be called upon to do this, as the rates of contributions were such that a deficiency would seldom occur. Both in the application for membership and in the policy there was a provision that in consideration of the payments by the company the acceptance of benefits should operate as a release of all claims for damages against the company. One of the members of the association received injuries due to the negligence of the company, and it was held that the acceptance of benefits by him from the association did not bar his right of action against the railway company to recover damages for the injury.[154]

lease of railroad valid and not against public policy: Chicago B. & Q. Ry. v. Bell, 44 Nev. 44; 62 N. W. Rep. 314.

[153] Fuller v. B. & C. Emp. Rel. Assn., 67 Md. 433; 10 Atl. Rep. 237.

[154] Miller v. Chicago B. & Q. Ry. Co. (U. S. C. C. D. Colo. 1894); 65 Fed. Rep. 305. In this case the court said: "I am amazed to find that in several courts of unquestioned dignity and authority the defense here made has been fully sustained (Id. 308, per Hallett, D. J., citing Clements v. Railway Co. (1894), App. Cas. 482; Johnson v. Philadelphia etc. R. R. Co., 163 Pa. St. 127; 29 Atl. Rep. 854; Leas v. Penn. Co., 10 Ind. App. 47; 37 N. E. Rep. 423), and the court continues: "I can only say I can agree with none of them. The reason of the thing stands altogether on the other side."

§ 869. Beneficiary not Liable for Premiums Paid by Stranger.—A stranger who voluntarily pays a premium upon a policy upon the life of another, cannot recover the same of the beneficiary, and he has no lien upon the proceeds of such insurance which he has collected as the agent of the beneficiary.[155]

§ 870. Payment of Assessments by Beneficiary Gratuitous.—The payment of assessments by the beneficiary of a benefit certificate will be regarded as gratuitous, and as creating no equities in favor of such beneficiary, provided there is no contract as to such payment.[156]

§ 871. Amount of Policy and Premiums Advancements to Beneficiary.—If a father purchases and pays for a policy of insurance on his own life in the name of his daughter, and for her sole benefit, and pays the annual premium until his death, the amount of the policy and of the annual premium after its purchase are advancements.[157]

§ 872. Payment of Benefit Fund.—A beneficiary fund payable on the death of a member of an association to persons named by him, is not to be treated as part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or to their guardians.[158] It may not be shown that it is customary to reinstate defaulting members upon payment of past dues, where an action is brought for a death benefit against a beneficial association.[159]

§ 873. Beneficiary Entitled to Fund—Fund Cannot be Garnished.—The fund appropriated by a benefit society to be paid over under the statute, to the member's family upon

[155] Meier v. Meier, 88 Mo. 566; 15 Mo. App. 68.

[156] So held in Jory v. Supreme Council A. L. of H., 105 Cal. 20; 38 Pac. Rep. 524; 26 L. R. Annot. 733.

[157] So held in Luckenbacher v. Zimmerman, 10 S. C. 110; 30 Am. Rep. 37.

[158] Catholic B. Assn. v. Priest, 46 Mich. 429. Who may recover as beneficiary, see note 14 Am. St. Rep. 526.

[159] Dickinson v. Ancient O. U. W., 159 Pa. St. 258.

his death cannot be garnished to satisfy a debt due from a member of the family, nor can it be seized for a debt due from the society or organization.[160]

§ 874. **Two or More Beneficiaries—Joint Tenancy.**—In a case in Wisconsin,[161] where a policy was payable to the wife and daughter of the assured, the question arose whether the policy was payable to the beneficiaries, as tenants in common or joint tenants. The laws of the state[162] provided that "all grants and devises of land made to two or more persons shall be construed to create estates in common, and not in joint tenancy," also that "the preceding section shall not apply to mortgages, nor to devises or grants made in trust or made to executors or to husband or wife," [163] and the defendant claimed that under these provisions only one thousand dollars was payable to the daughter, and the other thousand reverted to the estate, because of the death of the mother. But the court held that because of the close analogy to property held in joint tenancy, the policy was payable as an entirety, and it may be reasonably asserted that this insurance in joint tenancy, with the right of survivorship, is within the exception of the statutes of that state in analogy to devises, and that the doctrine of the common law governs it

§ 875. **Beneficiary may Sue on Policy.**—The beneficiary of a life insurance policy may maintain an action in his own name against the company to recover the proceeds of the policy.[164] In such a case, a judgment in favor of the beneficiary will not, however, it is held, preclude an inquiry between

[160] Brown v. Balfour, 46 Minn. 68; 48 N. W. Rep. 604, under Gen. Stat. Minn. 1878, c. 34, sec. 369, providing that fund be paid over to family, and be exempt to amount of five thousand dollars, and not liable to be seized to pay deceased member's debt under any circumstances.

[161] Farr v. Trustees Grand Lodge A. O. U. W., 83 Wis. 446; 53 N. W. Rep. 738.

[162] Rev. Stat., sec. 2068.

[163] Rev. Stat., sec. 2069.

[164] Pacific Mut. L. Ins. Co. v. Williams, 79 Tex. 633; 15 S. W. Rep. 478.

the legal representatives of the insured and the beneficiary, as to who is ultimately entitled to the proceeds.[165]

§ 876. Where Money Due Beneficiary has been Paid Administrator of Assured.—If money due on a policy which designates a certain person as beneficiary is paid to the administrator of the assured, the representative of the beneficiary may recover the same from the administrator, to whom the proceeds have been paid.[166]

§ 877. Right of Beneficiary—Premiums Paid with Misappropriated Money or Funds.—The fact that a part of the premiums on a life policy taken out by a husband on his life for the benefit of his wife have been paid with money of his, misappropriated by him from the firm, will enable the surviving partner, as against the beneficiary, to recover the whole amount of the insurance money, where it appears that such sum does not equal that wrongfully appropriated. It is a question, however, as to what the rights of the beneficiary and the surviving partner would have been in equity had the amount of insurance exceeded such misappropriated funds.[167] And where all the premiums were paid with stolen money, and the amount stolen exceeded the amount of the policies, the firm from which the money was stolen was held entitled to the entire proceeds of the policy, as against the beneficiary.[168]

[165] Pacific Mut. L. Ins. Co. v. Williams, 79 Tex. 633; 15 S. W. Rep. 478.

[166] Kimball v. Gilman, 60 N. H. 54.

[167] Holmes v. Gilman, 138 N. Y. 369; 52 N. Y. St. Rep. 873; reversing 64 Hun (N. Y.), 227; 46 N. Y. St. Rep. 110; distinguishing Central Bank v. Hume, 128 U. S. 195, on the ground that in that case "the moneys used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children": Id. 383, per Peckham, J. See on this point, 1 University L. R. 14.

[168] Holmes v. Davenport (N. Y. S. C. 1892), 18 N. Y. Supp. 56. In the case of Holmes v. Gilman, cited in the last note, the court refused to decide what might be the rights of the parties in equity had the insurance money exceeded the amount of rents appropriated: Id. 385, per Peckham, J.

§ 878. Statutory Provisions Limiting Beneficiaries of Benefit Certificates — Certain Classes.—In several of the states statutes have been enacted permitting benefit societies to organize, for the purpose of the payment of a certain fund upon the death of the member to the widow or relatives of the member, or certain other specified classes. Where the provision restricting the beneficiary to certain classes is merely contained in the by-laws, and is not a statutory enactment, the company or society may in many cases be estopped to set up the fact that the beneficiary is not within such classes.[169] Where, however, the provision is a statutory or charter one, the company cannot waive it, and has no authority to issue a benefit certificate payable to a person who is not of the prescribed classes.[170]

§ 879. Statutes—Beneficiaries—Wife and Children. As noted in a preceding section,[171] the rights of beneficiaries in general to the proceeds of a policy are, in a large number of states, protected by statutory exemptions as to creditors' claims, while in a large number of states statutes have been enacted for the express purpose of securing to the wife and children of insured, as beneficiaries, the proceeds of the policy, free from claims against the husband or his estate in favor of creditors, subject, however, in some states, to certain exceptions, where the premiums in excess of a certain amount have been paid out of the husband's property or funds.[172] These statutes are not de-

[169] See secs. 35, 36, and chap. xvi, herein.

[170] Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593 (charter); Duvall v. Goodson, 79 Ky. 224 (charter); American Legion of Honor v. Perry, 140 Mass. 580 (statute); Daniels v. Pratt, 143 Mass. 221 (statute); Knights of Honor v. Nairn, 60 Mich. 44 (statute); National Mut. Aid Assn. v. Gonser, 43 Ohio St. 1 (statute). But see Maneely v. Knights of Bir., 115 Pa. St. 305 (charter).

[171] See secs 858, 859, herein.

[172] Ala. Code, 1886, vol. 1, sec. 2356; Cal. Laws, 1891, c. 116, sec. 8. And see Deering's Annot. Civ. Code, sec. 3470; Colo. Mills' Annot. Stat. 1891, sec. 2246; Conn. Gen. Stat. 1888, sec. 2799. See Comp. Laws Dak. 1887, sec. 4677; Del. Rev. Code, 1852, as amended 1893, p. 599, c. 76; Fla. Dig. 1881, p. 534, sec. 22; Ill. Myers' Rev. Stat. 1895, p. 839, c. 73, sec. 54; Ind. Burns' Annot. Stat. Rev. 1894, sec. 5048 (3848); Iowa McClain's Stat. 1888, secs. 1756, 3576; Kan. Gen.

clarative of any common-law principle, but are enabling acts creating a new right and conferring a special privilege, and, to secure the exemption intended, the statute must be conformed to, but a liberal construction will be given to secure the relief intended where a proper case arises for which the statute makes provision.[173] In Alabama, although a statute may permit a husband and father to insure his life for the benefit of his minor child or children, yet he cannot, as against existing creditors, assign a policy taken out in his own name to a minor child for the consideration of love and affection. Such assignment being constructively fraudulent, the proceeds may be reached in equity

Stat. 1889, vol. 1, annot., sec. 3401; Ky. Pub. Acts 1869-70, c. 645, secs. 30-32; Me. Freeman's Supp. Stat. 1885-95, p. 328, c. 49, sec. 9; p. 320, c. 49, sec. 9; Md. Code Pub. Gen. Laws, 1888, vol. 1, p. 321, sec. 117 (1868, c. 471, sec. 101); Id., p. 803, secs. 8, 9; Pub. Gen. Laws, 1860, art. 45, sec. 8; 1862, c. 9; 1868, c. 471, sec. 101; 1878, c. 200; Mass. Acts 1888, c. 429, sec. 15; Acts 1887, c. 214, sec. 73; Acts 1890, c. 421, sec. 23; Mich. 1 Howell's Annot. Stat. 1882, sec. 4238; 2 Id., sec. 6300; Minn. 1 Kelly's Stat. 1891, sec. 3047; Miss. Thomp., Dill. & Campb. Annot. Code, 1892, secs. 1964 (1261), 1965; Mo. 2 Rev. Stat. 1889, secs. 5851-54; Montana 2 Annot. Codes (Civ. Code), 1895, sec. 732; Act March 8, 1893; Nevada Laws, 1891, c. 98, sec. 9; N. H. Pub. Stat. 1891, p. 487, c. 171, secs. 1-3; N. Y. 2 Birdseye's Rev. Codes and Laws, 1890, p. 1626, sec. 245; 3 Rev. Stat., 8th ed., p. 1709, sec. 19, p. 1711; N. Dak. Laws, 1891, c. 73, sec. 18; c. 74, sec. 15; N. C. Const., art. 10, sec. 8; Ohio 2 Giauque's Rev. Stat., 6th ed., p. 1368, sec. 5427; 1 Id., p. 900, secs. 3628, 3629; Oklahoma Stat. 1890, p. 636, sec. 19; Pa. Pepper & Lewis' Dig. 1894, vol. 1, p. 2383, 90, 91; Pub. Laws, 1868, 103, sec. 1; Pub. Laws, 1876, 53, sec. 25; Bright. Purd. Dig. 1894, vol. 1, 12th ed., p. 1048, secs. 71, 72; S. C. Gen. Stat. 1882, sec. 1358; S. Dak. Laws, 1890, p. 130, sec. 22; Tenn. Mill & Vert. Code, 1884, secs. 1813, 3135; Vt. Stat. 1894, p. 504, secs. 2653-57; W. Va. Code, 1891, 3d ed., p. 620, secs. 5, 6; Wis. 1 Sandb. & B. Annot. Stat., p. 1361, sec. 2347; Amended, c. 271, 1889; Amended Laws, 1891, c. 396. See cases cited under secs. 858, 859, herein.

[173] Friedman v. Fennell, 94 Ala. 572, per Stone, C. J., citing Connecticut L. Ins. Co. v. Webb, 54 Ala. 688; Fearn v. Ward, 80 Ala. 555; 3 Brick. Dig. 490, sec. 8; Felrath v. Schonfield, 76 Ala. 199; Tompkins v. Levy, 87 Ala. 263; Elliott's Appeal, 50 Pa. St. 75; 88 Am. Dec. 525, and note. "The purpose is to enable the husband to make valuable provision for his wife and children after his death above, beyond, and unaffected by his estate, personal and real, and the conditions of the same remaining after his death": Burwell v. Snow, 107 N. C. 86, per Merriman, C. J.

by said creditors.[174] Under a Florida statute,[175] providing that the proceeds of a policy should inure to the beneficiary, and not be subject to any claims of insured's creditors, it was held that a direction written on a policy to pay it to a person named was equivalent to a declaration made in the policy at the time of its issue.[176] In Indiana, if a husband's life is insured for his wife's benefit, and the wife signs a note given the company by the husband for a loan, and the policy is assigned to the company, she is her husband's surety, and the loan may not be deducted from the insurance money paid on the husband's death, even though it is stipulated that the balance for the year's premium, if any, and all other indebtedness be first deducted.[177] In Louisiana, the surviving widow and children, payees of a life policy, take in equal proportions.[178] A Michigan statute[179] provides that if any certificate of insurance is issued upon the life of a person over sixty-five years of age by a benefit association organized under the state law, it shall "be void as to the beneficiary therein named, but the amount thereof shall be payable to the heirs of the member," and it is held that the law does not apply to a policy which was issued prior to the passage of the act, and where money is paid voluntarily to the beneficiary of a void policy the heirs have no claim thereto.[180] Under a Massachusetts statute[181] relating to mutual benefit associations, and which exempted the fund held for members from attachment, and declared that the laws relating to life insurance companies should not apply, it was held that a member could not assign his interest as collateral security for a debt, but the person named by the member as his beneficiary might make such an assign-

[174] Friedman v. Fennell, 94 Ala. 570. The court said such transfer stood "on no higher plane than any other attempt he might make to give away his property at the expense of his debts": Id. 573, per Stone, C. J.; Code Ala. 1886, sec. 2356.

[175] Chapter 1864.

[176] Eppinger v. Canepa, 20 Fla. 262, 281.

[177] Union Cent. Ins. Co. v. Woods, 11 Moon (Ind. A. C.), 335; 39 N. E. Rep. 205. See 37 N. E. Rep. 180.

[178] Re Crane, 47 La. Ann. 896; 17 S. Rep. 431.

[179] Laws 1887, Act 187, sec. 16.

[180] Smith v. Pinch, 80 Mich. 332; 45 N. W. Rep. 183.

[181] Mass. Stat. 1877, c. 204.

ment after his interest had vested.[182] Another act in the same state provided for the assistance of members of the police department when sick and disabled, and also for assistance to their families.[183] This act was amended,[184] extending the benefit to members retired under a prior statute.[185] It was held that the statute was merely permissive, and that the association, might, under a by-law, extend the benefit to a part only of the class named, and any act of the officers of the association extending the benefit to those not included under the by-law was not binding upon the association.[186] Under the Massachusetts general statutes,[187] if a policy of insurance is issued upon the life of the husband for the benefit of the wife, her children have no interest in the policy during her lifetime, and upon her husband's death her interest in the policy may be attached by her creditors.[188] The New York statute exempting such funds from "debt or liability" includes debts contracted before and after the fund is received.[189] So in another case in that state it is held that if the statute permits a wife to insure her husband's life for her sole use, exempt from claims of her husband's creditors, except as to the excess of a certain sum paid for premiums out of her husband's property, and the wife pays the entire premiums out of her separate property, without the same having been repaid to her, she is entitled to the insurance money, to the entire exclusion of liability for the husband's debts.[190] In North Carolina, under the constitution[191] one may insure his own life for the benefit of his

[182] Briggs v. Earl, 139 Mass. 473.

[183] Stat. Mass. 1876, c. 16.

[184] Stat. Mass. 1882, c. 78.

[185] Stat. 1878, c. 244, sec. 5.

[186] Burbank v. Boston Pol. Rel. Assn., 144 Mass. 434; 11 N. E. Rep. 691.

[187] Chapter 58. sec. 62; c. 113, sec. 2, cl. 11.

[188] Norris v. Massachusetts M. Ins. Co., 131 Mass. 294.

[189] Clark v. Lynch (N. Y. S. C. 1895), 65 N. Y. St. Rep. 68, under Laws N. Y. 1884, c. 116; Laws N. Y. 1889, c. 520.

[190] Matter of Goss; In re Tuthill; In re Rogers (N. Y. S. C. 1893), 71 Hun (N. Y.), 120; 54 N. Y. St. Rep. 199; 24 N. Y. Supp. 623. See O'Rourke v. John Hancock Mut. L. Ins. Co., (N. Y. 1895), 63 N. Y. St. Rep. 522.

[191] Article 10, sec. 7.

wife and children, and they will be entitled to the proceeds, free from the claims of the insured's creditors.[192] The Ohio statute of 1890,[192a] permitting one to insure his life for benefit of his wife and children to the extent of a policy represented by one hundred and fifty dollars in annual premiums, the balance to go to his personal representatives and creditors, is held to apply as well to a policy issued by a foreign company, as to one issued by an Ohio company.[193] Under the Ontario statute, a bequest of life insurance to the testator's wife cuts off creditors, being a valid declaration of trust.[194]

§ **880. Where Amount Exempted is Unreasonable—Unconstitutionality of Law.**—If the amount of benefit funds exempted by the statute from seizure for the insured's and beneficiary's debts is unreasonable, the statute to that effect is unconstitutional and void.[195]

§ **881. Statute—Insurance of Husband's Life—Sole Benefit of Wife—Mutual Benefit Society—Vested Interest in Wife.**—Although a statute may provide that a wife may insure her husband's life, or that he may insure his life in favor of his wife, and that such insurance shall inure to her sole and separate benefit and that of the children, nevertheless such statutes do not apply to mutual benefit insurance, so as to vest in the wife an absolute right to the money, which will pass to her personal representatives.[196]

[192] Burwell v. Snow, 107 N. C. 87.

[192a] Rev. Stat. 1890, vol. 1, secs. 3628, 3629.

[193] Cross v. Armstrong, 44 Ohio St. 613. See Weber v. Paxton, 48 Ohio St. 266; 26 N. E. Rep. 1051.

[194] McKibbon v. Feegan, 21 Ont. App. 87; 14 Can. L. T. 5; Rev. Stat. Ont., c. 136, sec. 5; Re Lynn v. Toronto Gen. Trusts Co., 20 Ont. Rep. 475; Beam v. Beam, 24 Ont. Rep. 189, approved. For construction, Rev. Stat. Ont., c. 167; 52 Vict., c. 32, sec. 4; Rev. Stat. Ont., c. 136; Act 51 Vict., c. 22, sec. 2. See Morgan v. Hunt (Ont. H. C. J. C. P. Div. 1895), 15 Can. L. T. 224.

[195] How v. How (Minn. 1895), 61 N. W. Rep. 456; Gen. Laws Minn. 1885, c. 184, sec. 17.

[196] Given v. Wisconsin Odd Fellows' M. L. Ins. Co., 71 Wis. 547; 37 N. W. Rep. 817, under 1 Sandb. & B. Annot. Stat., p. 1361, sec. 2347.

§ 882. Statute—Rights of Children—Declaration of New Trust.—Although a statute may enable a member to transfer or limit the benefits of a certificate in any manner or proportion he sees fit, as between his children, yet if by naming a child under a certificate a trust is created, he may not declare a new trust or make a new designation, the effect of which would be to make the statute nugatory, and by making the fund liable for debts deprive the children of all benefits.[197]

[197] Neilson v. Trusts Corp. of Ontario (Ont. H. C. J. C. P. D. 1894), 14 Can. L. T. 134; Rev. Stat. Ont., c. 136; as amended, 51 Vict., c. 22. See 53 Vict., c. 39. sec. 6. See, generally, note 52 Am. St. Rep. 543-578 under the following heads: "Law Governing Mutual Insurance Generally," "Resort to Courts—Arbitration," "Application of Statutes," "Estoppel—Waiver," "General Features of Mutual Insurance," "Application, Acceptance, and Membership," "Certificate of Membership and of Insurance," "Charter—Constitution—By-Laws—Rules," "Power of Company and its Agents," "Beneficiaries—Designation," "Proofs of Death," "Insurance Money—Vested Rights—Assignment," "Title to Proceeds—Descent and Distribution," "Wife or Widow," "Heirs, Generally," "Mother," "Sister," "Executors and Administrators," "Personal Representatives," "Creditors," "And Others," "Dues and Assessments," "Forfeiture—Suspension—Expulsion—Surrender," "Actions."

TITLE V.

INSURABLE INTEREST.

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CHAPTER XXVII.

INSURABLE INTEREST.

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SUBDIV. I. Insurable Interest, Generally.

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SUBDIV. I. Insurable Interests, Generally.

§ 887. Insurable Interest Defined.—An insurable interest in property is any right, benefit, or advantage arising out of or dependent thereon, or any liability in respect thereof, or any relation to or concern therein of such a nature that it might be so affected by the contemplated peril as to directly damnify the insured.[1] It is difficult to define an insurable interest in a life. It may, however, be stated, as a general rule, that it ought to be such an interest as would take the risk out of that class denominated "wagers,"[2] and one of such a nature as would justify a reasonable expectation of advantage or benefit from the continuance of the life of the assured. It may rest upon a pecuniary basis, as that of a creditor of, or surety for, the assured, or may be based upon consanguinity or affinity, involving a claim to support or some advantage, or even upon a contemplated marriage.[3] The above rule is supported

[1] "What is the interest in the property which shall make the contract valid? We think the best definition to be, any such interest as shall make the loss of that property a pecuniary damage to the insured": 1 Parsons on Marine Insurance, ed. 1868) 161. "Every interest in property or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest": Deering's Annot. Civ. Code Cal., sec. 2546; Dakota Codes (Levisee), pp. 1027, 1029, secs. 1475, 1483-94. Insurable interest defined in Trinity College v. Insurance Co., 113 N. C. 244, 247; 18 S. E. Rep. 175. See Warren v. Davenport Ins. Co., 31 Iowa, 464, 465; Lazarus v. Commonwealth Ins. Co., 19 Pick. (Mass.) 81-98; note 2 Am. Lead. Cas., 5th ed., 806.

[2] Grant v. Kline, 115 Pa. St. 618; 9 Atl. Rep. 150; Stevens v. Warren, 101 Mass. 564; Gilbert v. Morse, 104 Pa. St. 74; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.), 268; Lord v. Dall, 12 Mass. 115; Mutual B. Assn. v. Hoyt, 46 Mich. 473. But see Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. (N. J.) 576.

[3] Forbes v. American Mut. L. Ins. Co., 15 Gray (Mass.), 249; Appeal of Corson, 113 Pa. St. 438; Ætna L. Ins. Co. v. France, 94 U.

by the weight of authority of those cases wherein the question has been directly adjudicated, but, as we shall note hereafter, there are some decisions wherein the courts have declared a more liberal rule. Every person has an insurable interest in his own life, and this is said to be based upon the interest which his representatives have in him.[4]

§ **888. Insurable Interest—Generally.**—An insurable interest is sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or jus in re or jus ad rem. It may cover inchoate rights,[5] or rights in expectation, such as profits or commissions. Again, a person may be so circumstanced that it is important that a thing should have a continued existence; or he may be so related to, or concerned in the same, that he would almost positively derive a certain benefit or advantage therefrom but for its exposure to risks and damages, in which case he is interested in its safety or situation; or he might be liable or suffer some disadvantage or prejudice by its loss, damage, or destruction; or his relation to the property might be such in reference to the rights of others therein, that he is liable for its safety, care, and protection; or it may be a right so closely connected with property, and so dependent upon the continued existence of it alone for value,

S. 561; Succession of Hearing, 26 La. Ann. 326; Warwick v. Davis, 104 U. S. 779; Elkhart v. Houghton, 103 Ind. 286; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324; 1 L. R. Annot. 238; Holabird v. Atlantic Ins. Co., 2 Dill. (C. C.) 166; Miller v. Eagle L. & H. Ins. Co., 2 E. D. Smith (N. Y.), 268; Grant v. Kline, 115 Pa. St. 618; 7 Cent. Rep. 626; Lord v. Dall, 12 Mass. 115; Loomis v. Eagle L. etc. Ins. Co., 6 Gray (Mass.), 396; Chisholm v. National L. Ins. Co., 52 Mo. 213; 14 Am. Rep. 414. See Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419, and cases under following sections. "Every person has an insurable interest in the life and health: 1. Of himself; 2. Of any person on whom he depends, wholly or in part, for education or support; 3. Of any person under a legal obligation to him, for the payment of money or respecting property or services, of which death or illness might delay or prevent the performance; and 4. Of any person upon whose life any estate or interest vested in him depends": Deering's Annot. Civ. Code Cal., sec. 2763.

[4] Provident Ins. Co. v. Banna, 29 Ind. 236. See Hoyle v. Guardian L. Ins. Co., 6 Robt. (N. Y.) 570; 4 Abb. Pr., N. S., 349.

[5] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132, 140, per Story, J.

as that a loss of the property will cause pecuniary damage to the holder of the right. The right need not necessarily refer to the whole or part of the thing, nor necessarily or exclusively to that which may be the subject of privation; but may only sustain such a relation thereto that the insured would be prejudiced by the happening of the peril contemplated. Absolute ownership is not necessary; it may be some right or interest which some court will enforce in the property. The interest may be a conditional, contingent or equitable one. It may refer to a future interest or rest upon a valid executory contract. It may be a right to the possession of property, or arise from a lien or from advancements, or from some title in the property. The subject need not necessarily have a value or price, or actual or corporeal existence. It may relate to a mere right to have a trust performed or obligation fulfilled, as in cases of guarantee insurance. In brief, by interest in a thing every benefit or advantage arising out of, or dependent on, such thing may be considered as comprehended. In determining, however, what constitutes an insurable interest, it must be remembered in all cases relating to insurance on property that the contract is one of indemnity; that risk is of its essence, and that therefore the happening of the event must result in pecuniary loss with reference to the interest, and must directly affect it.[6] Any person

[6] "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it imputeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily or exclusively that which may be the subject of privation, but the having some relation to or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the party insuring; and where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced in respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing and the interest derivable from it may be very different to the first. The price is generally the measure by interest in a thing. Every benefit and advantage arising out of or depending on such thing may be considered as be-

having an interest in property may through insurance indemnify himself against loss thereto.[7] In regard to what constitutes an insurable interest in a life, the English decisions are not so liberal as those in this country. It seems that there, with perhaps certain exceptions, as in case of an interest of a wife in a husband's life,[8] it has been held that there must be a pecuniary basis, and that ties of blood and affection are insufficient.[9] We have already considered the questions relating to wager policies and the statute 14 George III, chapter 48, which prohibited in-

ing comprehended": Lucena v. Crawford, 1 Bos. & P. N. R. 269, per Lawrence, J. It is enough if the insured be so situated, with reference to property, as to be liable to loss if it be destroyed by the peril insured against. Such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss by its destruction is an insurable interest. If there be a right or an interest in property which some court will enforce, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest: Finch, J., in National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 541; McColdin v. Greenwich Ins. Co., 10 N. Y. St. Rep. 390; 45 Hun (N. Y.), 592. See, also, Wiggin v. Mercantile Ins. Co., 7 Pick. (Mass.) 271; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; Fenn v. New Orleans Mut. Ins. Co., 53 Ga. 578; Warren v. Davenport Ins. Co., 31 Iowa, 464, 465; Swift v. Mutual etc. Ins. Co., 18 Vt. 305; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Lazarus v. Commonwealth Ins. Co., 19 Pick. (Mass.) 81-98; note 2 Am. Lead. Cas., 5th ed., 806; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 12, per Andrew, J.; Lawrence v. Van Horne, 1 Caines (N. Y.), 276; Seagrave v. Union Mar. Ins. Co., 1 Har. & R. 302; 1 L. R. Com. P. 305; Williams v. Roger Williams Ins. Co., 107 Mass. 377. See, also, cases under sections next following. Insurable interest on property, what is: Notes 7 Am. Dec. 42-44; 20 Am. Dec. 510-18. 'An insurable interest in property may consist in: 1. An existing interest; 2. An inchoate interest founded on an existing interest; or 3. An expectancy coupled with an existing interest in that out of which the expectancy arises": Cal. Civ. Code, sec. 2547; N. Y. Civ. Code, sec. 1367. For statute against wagering policies, see Deering's Annot. Civ. Code Cal., sec. 2558.

[7] Honore v. Lamar F. Ins. Co., 51 Ill. 409.

[8] Reed v. Royal Exch. Assur. Co., Peake Add. Cas. 70.

[9] Bunyon on Life Insurance, 16. See further as to the English cases, Lucena v. Crawford, 2 Bos. & P. N. R. 270, 324; Halford v. Kymer, 10 Barn & C. 724; 8 L. J. K. B. 311; Hebdon v. West, 3 Best & S. 579; 32 L. J. Q B. 85; Shilling v. Accidental Death Ins. Co., 1 Fost. & F. 116; 27 L. J. Ex. 16; Ex parte Houghton, 17 Ves. 252.

surances upon lives by way of gaming or wagering, and also the question as to the validity of wager policies at the common law.[10] The rule as to the necessity of a pecuniary interest does not, perhaps, apply here to the same extent. Consanguinity or affinity constitute a sufficient insurable interest in a life, where they involve a reasonable claim to support, or some benefit or advantage.[11] And in other cases the courts have declared that the mere relationship is sufficient,[12] although there are numerous decisions which hold that there must be some reasonable expectation of pecuniary advantage in all such cases; that is, a direct and pecuniary interest.[13] It may also be generally stated that a person has an insurable interest in the life or health of another whenever there exists a reasonable expectation that a benefit or advantage would arise to the person from the continuance of the life of the insured, or where death or sickness would delay the performance of some legal obligation respecting property or services, or where the relations are such that one depends upon another for support or education, in whole or in part, or where death would destroy a claim or render its attainment impossible. It is not necessary that the benefit is certain to result from the continuance of the life. Thus, it is not certain that one will, during his life, repay money advanced, but a person has a title to the performance of that obligation, and the happening of the contingency might wholly or partially defeat such right. A legal presumption of benefit and loss arises in such cases, which constitutes such an insurable interest as may be protected.[14] It is also said that it

[10] See secs. 148, 149, herein.

[11] Keystone Mut. B. Assn. v. Norris, 115 Pa. St. 446; Reserve Mut. L. Ins. Co. v. Kane, 81 Pa. St. 154; 22 Am. Rep. 741; Corson's Appeal, 113 Pa. St. 438; Grattan v. National L. Ins. Co., 15 Hun (N. Y.), 74; Warnock v. Davis, 104 U. S. 779.

[12] Ætna L. Ins. Co. v. France, 94 U. S. 561.

[13] Charter Oak L. Ins. Co. v. Brandt, 47 Mo. 419; Continental L. Ins. Co. v. Volger, 89 Ind. 572; Gambs v. Covenant Mut. L. Ins. Co., 50 Mo. 44; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35.

[14] Warnock v. Davis, 104 U. S. 775; Miller v. Eagle L. & Health Ins. Co., 2 E. D. Smith (N. Y.), 268, per Woodruff, J.; Hoyt v. New York etc. Ins. Co., 3 Bosw. (N. Y.) 440; Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244. Life insurable interest, when it exists, see notes 46 Am. Rep. 189-91; 52 Am. Rep. 137-48. See, also, for authorities and illustrations, sections following herein.

is sufficient that an indirect advantage may result to a person from the continuance of the life insured.[15]

§ **889. Necessity of an Insurable Interest.**—Notwithstanding decisions upholding the validity of innocent wager policies at common law,[16] it is now universally held in the different states, either by force of statutory regulations or upon general principles of public policy, or similar grounds, that an insurable interest is necessary to the validity of a policy, no matter what may be the subject matter. If no insurable interest exists, the contract is void;[17] for the principal thing is, that the assured has acted in good faith, and has an insurable interest.[18] Thus, a policy on property wherein the insured has no interest or title is void, and no recovery can be had thereon in case of loss either by the assured or his assignee, and notes given for the premium upon such an insurance are void, for want of consideration.[19] So a party insuring must have an interest in the life to be insured when the insurance is effected for his own benefit, or the policy will be void.[20] Thus, a promise on the part of one who has no insurable interest in the life of another to pay his wife a certain sum of money after his death,

[15] Trenton Ins. Co. v. Johnson, 24 N. J. L. (4 Zab.) 586, per the court.

[16] See Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 318.

[17] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97; Connecticut L. Ins. Co. v. Schaefer, 94 U. S. 457, per the court; Halford v. Kymer, 10 Barn. & C. 725; Sawyer v. Mayhew, 51 Me. 398; Tallman v. Atlantic Ins. Co., 3 Keyes (N. Y.), 87; Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; 78 Am. Dec. 418; Carter v. Humboldt Ins. Co., 12 Iowa. 287; Freeman v. Fulton Ins. Co., 38 Barb. (N. Y.) 247; 14 Abb. Pr. 398; Guardian Ins. Co. v. Hogan, 80 Ill. 36; Mitchell v. Union L. Ins. Co., 45 Me. 104; 71 Am. Dec. 104; Burbage v. Windley, 108 N. C. 357; 12 S. E. Rep. 839; 12 L. R. Annot. 409; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; Franklin Ins. Co. v. Sefton, 53 Ind. 380; Sadlers v. Babcock, 2 Ark. 554. "The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void": Deering Annot. Civ. Code Cal., sec. 2551.

[18] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[19] Busch v. Sinissippi Ins. Co., 28 Ind. 64; Fowler v. New York etc. Ins. Co., 26 N. Y. 422; Sweeney v. Franklin Ins. Co., 20 Pa. St. 337; Peabody v. Washington Ins. Co., 20 Barb. (N. Y.) 339, and cases in note 17 above.

[20] Mitchell v. Union L. Ins. Co., 45 Me. 104; 71 Am. Dec. 529.

in consideration of permission to insure his life, is based upon no valid consideration, and the policy is absolutely void.[21] And a moral claim does not constitute an insurable interest in the life of another, in behalf of one as a creditor.[22]

§ 890. Insurable Interest Distinguished from the Property or Life Insured.—It was early said by Emerigon when writing of insurances under the Ordonnance, permitting navigators, passengers, and others to insure the freedom of their persons, that it was the freedom, namely, the price of ransom or sum to be paid therefor, in case of capture, and not the person, that was insured. Again, referring to slaves, he declares, relying upon Pothier, that being chattels of commerce, and susceptible of valuation, their lives were the proper subject for insurances.[23] We have also seen that insurance is a personal contract; that the thing is not insured, but the right to indemnity appertains to the person, and that insurances do not attach to the realty or pass with it as an incident thereto. So in case of property generally, it is the interest therein, or connected therewith, that is protected, and not the property itself. The question is, in all cases, whether the insured has sustained any loss, damage, detriment, or prejudice by the injury or the destruction of the thing in which the interest exists, or to which it is related, and the nature of the interest with reference to the property is important. A person may be the owner of property insured, but the nature of the ownership is material, as well as its duration. If the ownership ceases, as in case of alienation or in case the policy be assigned without the necessary consent, the assured's right to indemnity deter-

[21] Burbage v. Windley, 108 N. C. 357; 12 S. E. Rep. 839; 12 L. R. Annot. 409.

[22] Guardian M. D. Ins. Co. v. Hogan, 80 Ill. 35. Insurable interest in life of another, necessity for, what constitutes, see note 57 Am. Dec. 93-105, and for other cases see sections following.

[23] Emerigon on Insurance, Meredith's ed. 1850, 158, 167, 168. The Ordonnance, art. 9, provides that "all navigators, passengers, and others shall be permitted to cause to be insured the freedom of their persons," the policies naming "the sum to be paid in case of capture, as well for ransom as the expenses of return": Id. 158; Guidon de la Mer, c. 16, art. 3.

mines. So in case of life risks, the interest in the continuation of the life constitutes an essential element of the contract, although such interest need only exist at the inception of the risk, and not at the time of the loss.[24] In stating that insurance is a personal contract, this does not imply in all cases that the interest in an insured property essential to a recovery must be personal, for the policy may be "on account of or for whom it may concern," when the recovery may be had by or in behalf of that person whose interest was intended to be covered, and is existing at the time of loss,[25] or the principal authorizing the insurance may be undisclosed, in which case he may recover;[26] or the interest may be as agent or trustee, or in some like character, provided the relation existed both when the insurance was effected and when the loss occurred.[27] And in Ellicott v. United States Insurance Company[28] the action was against an insurance company upon a writing, under which the defendant guaranteed the bearer payment of a certain sum upon presentation, and it was held that the bearer could sue upon it, although it was not issued to him. This case has been cited as supporting the proposition that a policy may be issued to bearer, and that it would "be operative in the hands of any person who is the legal bearer at the time of loss, and has an insurable interest in the property covered thereby," provided he establishes his rights under the policy and his insurable interest, and that the policy thus made is the incident of the property covered instead of a mere personal contract.[29]

§ 891. Insurable Interest at Common Law.—We have seen that a wager policy was valid at the common law where it

[24] See sec. 902, herein; Wilson v. Hill, 3 Met. (Mass.) 66; Lazarus v. Insurance Co., 19 Pick. (Mass.) 81; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495; Carter v. Humboldt Ins. Co., 12 Iowa, 287.

[25] See Walsh v. Washington Ins. Co., 32 N. Y. 427; 3 Rob. (N. Y.) 202; Waring v. Indemnity F. Ins. Co., 45 N. Y. 606; Bridge v. Niagara Ins. Co., 1 Hall (N. Y.), 247.

[26] Seamens v. Loring, 1 Mason (C. C.), 127.

[27] Graham v. Firemen's Ins. Co., 2 Disn. (Ohio) 255; Stillwell v. Staples, 19 N. Y. 401; 6 Duer (N. Y.), 63.

[28] 8 Gill & J. (Md.) 166.

[29] 1 Wood on Fire Insurance, 2d ed., 675.

was not contrary to the policy of the law,[30] and it would seem, therefore, that an insurable interest was unnecessary at the common law.[31]

§ 892. No Insurable Interest Under Unenforceable Contract.—A person can have no insurable interest where his only right arises under a contract, which he had no authority to make,[32] or which is void or unenforceable, either at law or in equity.[33]

[30] Section 149, herein.

[31] Chisholm v. National Capitol L. Ins. Co., 52 Mo. 213; Rittler v. Smith, 70 Md. 261, 263; Trenton Mut. L. & F. Ins. Co. v. Johnson (24 N. J.), 4 Zab. 576; Vivas v. Supreme Lodge K. of P., 52 N. J. L. (23 Vroom) 469; 20 Atl. Rep. 36; De Rouge v. Elliott, 23 N. J. Eq. 486, 492; 1 Marshall on Marine Insurance, ed. 1810, *112.

[32] Stainbank v. Fenning, 11 Com. B. 51. In this case the master put into a foreign port, the vessel being in a damaged state, borrowed money there of a merchant for the necessary repairs and disbursements, and to secure this drew bills upon his owner, and also executed an instrument purporting to be a hypothecation of the ship, cargo, and freight. By this instrument the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances, and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process "out of Her Majesty's high court of admiralty of England, or any court of vice-admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be according to the maritime law and custom of England," in the event of the bills being refused acceptance or being dishonored. It was held that this was not such an hypothecation as could be enforced in the court of admiralty, the payment of the money not being made to depend upon the arrival of the ship, the merchant had no insurable interest in the ship.

[33] Redfield v. Holland Purchase Co., 56 N. Y. 357; Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478. It appeared in this case that a policy had been issued to a mother and son upon a barn upon their farm. The son's only interest was that held under a parol contract on the part of the mother to subsequently convey the property to him. The statute of the state provided that a married woman might convey real estate by a deed in which her husband joined. It was claimed that under this statute the policy was void, but, the court held that the policy was void as to the son, since under such a contract he can have no insurable interest, but that this did not render the whole policy void. In Stockdale v. Dunlap, 6 Mees. & W. 224, the plaintiffs entered into a verbal contract with the owners of certain vessels for the delivery of certain goods, to

§ 893. Interest must be Neither Illegal nor Immoral. The interest necessary to support an insurance must be one which is neither illegal nor immoral, and in this sense it must be a lawful interest;[34] for if the interest is illegal, the contract is void.[35] This rule is not intended to go beyond the legality of the interest itself, and should not be confused with such illegal insurances as are void on other grounds; for a person might have a valid insurable interest in the property which, under certain circumstances, might be enforceable, when it would not be under other circumstances. Thus, a person may have an insurable interest in a ship or in a cargo, which is valid, but if the trade be illegal, it defeats the policy as to both ship and cargo.[36] Again, the insurable interest may be valid, but the recovery be defeated by the failure of the captain to comply with certain statutory requirements, whereby the voyage is rendered illegal;[37] or the insurance may be defeated by the insertion of stipulations in the policy, in consequence of which, under the law, the policy is avoided;[38] or the insurable interest may be destroyed by some illegal act, such as traffic with the

be brought by these vessels, and it was held that as the contract was a verbal one only, and was incapable of being enforced, the plaintiffs could have no insurable interest. The court said, per Abinger, C. B.: "If contracts for goods to be purchased in future were allowed to be made the subject of insurance, it would be allowing a wager policy to be made. But such a doctrine would defeat the legislative provisions on the subject, and create an imaginary interest, which has no foundation in law. Here there was no written contract, nor any contract which the plaintiffs could have enforced. The cases of freight suppose a contract which is capable of being enforced. Here no interest in the goods was passed to the plaintiffs. There is a contract to sell one hundred tons of palm oil, to arrive by the 'Maria.' If the vessel does not arrive and the goods do not arrive, the contract is void. Then, where is the interest? The transaction amounts in effect to the insurance of a void contract."

[34] Lord v. Dall, 12 Mass. 115; Carrigan v. Ins. Co., 53 Vt. 418; Mount v. Waite, 7 Johns. (N. Y.) 434; Ruse v. Mutual B. L. Ins. Co., 23 N. Y. 516; Sadler Co. v. Badcock, 2 Atk. 554.

[35] Redmond v. Smith, 7 Man. & G. 474.

[36] Gray v. Sims, 3 Wash. (C. C.) 276.

[37] Farmer v. Legg, 7 Term. Rep. 186; Suart v. Powell, 1 Barn. & Adol. 266; 1 Duer on Marine Insurance, ed. 1845, 377, note 2, et seq.

[38] Russell v. Degrand, 15 Mass. 35.

enemy in violation of a statutory prohibition;[39] or the insurance invalidated by its being effected in violation of some positive and express statutory provisions affecting the trade, the character of the goods, or the voyage.[40] The subject of illegal insurances will, however, be fully considered hereafter.[41]

§ 894. Wager Policies.—Where a person has no actual interest, or the policy is intended to cover a mere wager, the courts will not enforce the contract.

§ 895. Insurable Interest does not Necessarily Imply Property.—Although an absolute ownership is a common form of insurable interest, the term does not necessarily imply any property in the subject of insurance or ownership thereof;[42] for it is well settled at the present day that an insurable interest need not amount to a right of property or of possession. Whenever a legal connection can be shown to exist between injury to the thing insured and the loss to the party insuring, it is sufficient.[43] So if one has a right which may be enforced against the property, and which is so connected with it that its injury or destruction will necessarily damnify him, he has an insurable interest therein.[44] And whoever has such title, that if the property were lost without insurance the loss would fall on him, has an insurable interest. The interest of a mortgagor is within the rule.[45] So if one insured has any interest that would be injured, if the peril insured against should happen, his contract of insurance is a valid one.[46]

[39] See Jenks v. Halles, 1 Caines Cas. (N. Y.) 43; Hallett v. Jenks, 3 Cranch (U. S.), 210.

[40] Richardson v. Marine Ins. Co., 6 Mass. 101; Gray v. Sims, 3 Wash. (C. C.) 216; Chalmers v. Bell, 3 Bos. & P. 604; Gibson v. Service, 5 Taunt. 433.

[41] See chap. liv. herein.

[42] Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 163.

[43] McDonald v. Black, 20 Ohio, 185; 55 Am. Dec. 448.

[44] Rohrback v. Germania F. Ins. Co., 62 N. Y. 47. See Cone v. Insurance Co., 60 N. Y. 619.

[45] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[46] Agricultural Ins. Co. v. Clancey, 9 Ill. App. 137.

§ 896. Legal or Equitable Title—Qualified Interest. A qualified interest in property, or any interest which would be recognized by a court of law or equity, is an insurable interest.[47] While any legal or equitable interest is sufficient,[48] yet an insurable interest may exist, without any legal or equitable title to the property,[49] and the thing itself need have only a potential being, and not even a corporeal existence.[50]

§ 897. Conditional or Contingent Interest—Expectancy—Inchoate Rights.—A vested interest in possession is not necessary. A conditional or even a slight or contingent interest is sufficient, when founded on an actual right to the thing, or upon a valid contract to it. So an expectancy, coupled with an existing title to that out of which the expectancy arises, is an insurable interest.[51] Freight, profits, re-

[47] Warren v. Davenport F. Ins. Co., 31 Iowa, 464; 7 Am. Rep. 160.

[48] Fenn v. New Orleans Mut. Ins. Co., 53 Ga. 578; Franklin Ins. Co. v. Chicago Ice Co., 36 Md. 102; Ayres v. Hartford F. Ins. Co., 17 Iowa, 176; 85 Am. Dec. 553; Columbia Ins. Co. v. Laurence, 2 Pet. (U. S.) 25; Manson v. Phœnix Ins. Co., 64 Wis. 26.

[49] Rohrback v. Germania F. Ins. Co., 62 N. Y. 47; National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 541, per the court, Finch, J.; Carter v. Humboldt etc. Ins. Co., 12 Iowa, 287. Although Marshall (Marshall on Marine Insurance, ed. 1810, 115) declares that an insurable interest must be founded on some legal or equitable title: See Lancey v. Phœnix Ins. Co., 56 Me. 562.

[50] Hidden v. Slater Ins. Co., 2 Cliff. (C. C.) 266; Hancock v. Fishing Ins. Co., 3 Sum. (C. C.) 132, per Story, J.

[51] Fenn v. New Orleans Mut. Ins. Co., 53 Ga. 578. See Stockdale v. Dunlop, 6 Mees. & W. 224; Lucena v. Crawford, 2 Bos. & P. N. R. 269, 294, 295; Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132, 140, per Story, J.; Knox v. Wood, 1 Camp. 542; Camden v. Anderson, 5 Term Rep. 709, 711, per Lord Kenyon; Carroll v. Boston M. I. Ins. Co., 8 Mass. 51. "A vested interest in possession is not necessary to give the right of insuring. An expectancy coupled with a present existing title to that out of which the expectancy arises is an insurable interest. Inchoate rights founded on titles subsisting at the time of loss are insurable interests": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 237, *231. See 1 Id., Maclachlan's ed. 1887, 58, 59. "A conditional interest is a sufficient subject for insurance if it be properly described; that is, such an interest as a party actually has, but which is subject to be defeated by certain events": 1 Phillips on Insurance, 3d ed., 117, sec. 176. "Thus it is certain that it need not be a vested interest in possession. A mere

spondentia, and bottomry loans are of this description,[52] and so are expected commissions; [53] and prospective catchings may be insured,[54] and a contingent interest may be the subject of a policy "lost or not lost."[54a] But in such cases a perfect and complete title, with relation to the subject, must exist in the assured at the time of loss.[55] If the contingent interest is such as not

expectancy is sufficient, provided, however, and this is essential, that it be connected with the thing concerning which the expectancy exists, either by an existing title to the thing, or by a definite and obligatory contract, the execution of which will give title": 1 Parsons on Marine Insurance, ed. 1868, 163. "Inchoate rights founded on subsisting titles, unless prohibited by the policy of the law, are insurable": Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132, per Story, J. "Inchoate rights founded on subsisting titles, unless prohibited by positive laws, are insurable": Lucena v. Crawford, 2 Bos. & P. 294. "A mere contingent or expectant interest in anything not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable": Deering's Annot. Civ. Code Cal., sec. 2549.

[52] Lucena v. Crawford, 2 Bos. & P. N. R. 294, per Eyre, C. J. "Thus, freight payable either on the arrival of the goods or under a charter party, is insurable by the shipowner, provided his title to the freight has accrued at the time of loss, so that nothing but the intervention of the loss can prevent him from earning it. Thus again, profits expected to arise out of the sale or disposal of the goods on their arrival are insurable by the owner of the goods, provided the goods are on board at the time of the loss, and it can be shown but that for the loss a profit would have been made on them. So again, respondentia and bottomry loans are insurable by the lender whenever the instrument of hypothecation makes the recovery of his money depend on the risk of the voyage": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 237, *231. See 1 Id., Maclachlan's ed. 1887, 37, 40, 73, 87. "The assured has thus an inchoate right to freight, which was an insurable interest. It was lost by a peril insured against, and therefore the plaintiff had a right to recover": Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163, per Shaw, C. J.

[53] Putnam v. Mercantile Ins. Co., 5 Met. (Mass.) 392.

[54] Swift v. Mercantile Mut. Ins. Co., 113 Mass. 287.

[54a] Hooker v. Robinson, 8 Otto (98 U. S.), 528.

[55] Warren v. Davenport Ins. Co., 31 Iowa, 465; 1 Arnould on Marine Insurance, Perkins' ed., 237, *231; Stockdale v. Dunlap, 6 Mees. & W. 224; 1 Parsons on Marine Insurance, ed. 1868, 163; Rohrback v. Germania Ins. Co., 62 N. Y. 47; Knox v. Wood, 1 Camp. 542. "The expectation of profit or benefit to arise from some subject in which the party is not actually interested at the time of loss, but only expects to be interested, is a mere expectation of an expectation, and is not an insurable interest. Thus . . . . the expectations of

to be the subject of calculation, there would be a doubt whether it would be insurable under an open policy;[56] for the interest must be something more than a mere hope; thus, an expectation of a gift is not an insurable interest.[57] As we have noted, a reasonable expectation of pecuniary advantage from the continued existence of a life constitutes an insurable interest therein;[58] for it is enough that, according to the ordinary course of events, pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured, to the person obtaining the policy. On such a policy, the sum insured is the measure of the insurer's liability.[59]

§ 898. Liability to Others—Railroad Companies.—One may be so situated with reference to property, that he may become liable to others for its loss or destruction, although he has not an actual interest in the property itself. In such case he has an insurable interest therein. This rule applies by virtue of statutory provisions in some of the states to the case of railroad companies, who may become responsible to others for the loss of property along the line of their road, occasioned by fire communicated from an engine, or arising from the acts of their employees.[60] So the rule may apply to those persons intrusted by law or by contract with the care and custody of property of others, to whom they

commissions to arise out of the sale and disposal of a homeward cargo, which was neither loaded nor contracted to be loaded on board the ship at the time of her loss, is not an insurable interest": 1 Arnould on Marine Insurance, Perkins' ed., 237, 238, *231.

[56] See Mounford v. Hallet, 1 Johns. (N. Y.) 433, per Livingstone, J., as to profits and open and valued policies.

[57] See Lucena v. Crawford, 3 Bos. & P. 75.

[58] Sections 887, 888 herein.

[59] Hoyt v. New York etc. Ins. Co., 3 Bosw. (N. Y.) 440.

[60] Chapman v. Atlantic R. R., 37 Me. 92; Pratt v. Atlantic etc. R. R. Co., 42 Me. 579; Eastern R. R. Co. v. Relief Ins. Co., 105 Mass. 570; 98 Mass. 420; Perley v. Eastern R. R. Co., 98 Mass. 414; Hooksett v. Concord R. R. Co., 38 N. H. 242. As to liability of railroad for fires, see Ark. Mansf. Dig., sec. 553; Iowa Code, sec. 1289; Kan. Comp. Laws, 1885, c. 118, sec. 2; Gen. Laws N. H., c. 162, sec. 8. And see, also, Haseltine v. Concord R. R., 64 N. H. 545; 15 Atl. Rep. 143; Bulliss v. Chicago M. & St. P. Ry. Co., 76 Iowa, 680; 39 N. W. Rep. 245; Tilley v. St. Louis & S. F. Ry. Co. (Ark.), 6 S. W. Rep. 8.

are responsible for its safekeeping, where such property is liable to loss. Thus, if a steamboat is attached, and a party gives his bond for its delivery, he thereby acquires an insurable interest in the boat.[61] So common carriers, warehousemen, wharfingers, pledgees, pawnbrokers, or persons acting in a similar capacity, whether liable by law or custom to the same extent as an insurer, or only for their own negligence, may, to protect themselves against their own responsibility, insure goods in their custody, as well as to secure their lien.[62]

§ 899. Pecuniary Interest—Consanguinity or Affinity. In so far as the character of the risk is such that the contract is one strictly of indemnity, it is necessary that an insurable interest in the subject of insurance be a pecuniary one; that is, one which, in case of loss by the contemplated peril, has such a pecuniary value as that indemnity may be obtained.[63] In cases of life insurance, the authorities are not unanimous upon the question whether the interest must be a pecuniary one. The general rule, as deduced from a majority of the decisions, would seem to be, however, that the interest may rest upon a purely pecuniary basis, or, in cases of consanguinity or affinity, there is a sufficient interest where they involve a reasonable claim to support, or some benefit or advantage to be derived from the continuance of the life insured.[64] A general rule, not as broad, however, as the above, is stated by a North Carolina court substantially as follows: Ties of blood or marriage are necessary to support an insurable interest in a life, except one be a creditor or surety for another, or some contractual relation exist as the basis.[65] The court, per Burwell, J., in that

[61] Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311.

[62] Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S. 312, 323, per the court, citing numerous cases; Shaw v. Ætna Ins. Co., 49 Mo. 578. See sections following relating to common carriers, etc.

[63] Spone v. Home Mut. Ins. Co., 15 Fed. Rep. 707; Halford v. Kymer, 10 Barn. & C. 723.

[64] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324; 1 L. R. Annot. 238. See section 888, herein, and subsequent sections under this chapter wherein the cases of consanguinity and affinity are considered.

[65] Trinity College v. Travelers' Ins. Co., 113 N. C. 244; 18 S. E. Rep. 175.

case says: "Except in the cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a 'wagering contract,' and under its rules made and enforced in the interest of best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view. The end will not, in the eye of the law, justify the means." [66]

§ 900. Whether Insurable Interest Need be Stated.—While the subject matter of insurance and the nature of the risk should be properly described in the policy, neither the nature nor extent of the interest need, as a general rule, be specially set out therein, for an applicant is not obligated to disclose the same, unless inquired of particularly by the company, or the policy expressly provides therefor.[67] A qualified

[66] Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 248; 18 S. E. Rep. 175.

[67] Crowley v. Cohen, 3 Barn. & Ald. 478, per Lord Tenterden, C. J.; Russell v. Union Ins. Co., 4 Dall. (C. C.) 421; 1 Wash. (C. C.) 409; Mutual Ins. Co., v. Woodruff, 26 N. J. L. (2 Dutch.) 541; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; affirming 12 Wend. (N. Y.) 507; Stetson v. Massachusetts F. & M. Ins. Co., 4 Mass. 330; Springfield Ins. Co. v. Allen, 43 N. Y. 389, 396; Buck v. Phœnix Ins. Co., 76 Me. 586; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Carruthers v. Sheddon, 6 Taunt. 14; Van Hatta v. Mutual Security Ins. Co., 2 Sand. (N. Y.) 490; Bell v. Western M. & F. Ins. Co., 5 Rob. (La.) 424; Williams v. Roger Williams Ins. Co., 107 Mass. 377; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442, per Walker, J. And see discussion of this question in 2 Duer on Insurance, ed. 1846, 458, et seq., sec. 44.

or partial interest need not be stated,[68] and if the description cover the interest, or comes within the class specified, it is sufficient, even though the interest be required to be truly stated.[69] It is held that in certain cases the nature or character of the interest may be such as that a special description is required.[70] Thus, it seems that profits must be insured as such.[71] Where a husband insures his wife's separate estate, the policy must insure his interest;[72] and a bottomry interest is held insurable only eo nomine.[73] So it is held that a leasehold interest, where the policy is in a mutual company, must be disclosed.[74] In the absence of requirement in the policy to that effect, the pecuniary proofs of loss need not show an insurable interest in the life of the deceased.[75] This question will, however, be more fully considered hereafter.[76]

§ 901. As to the Time when the Interest must Exist.[77] There is no doubt but that if the assured has an insurable interest at the time the policy is obtained, and also at the time of loss, it entitles him to a recovery;[78] and it is also stated, as a general rule, that in risks other than life, he must have an interest at the time of the insurance and of the loss.[79] And it

[68] Lawrence v. Van Horne, 1 Caines (N. Y.), 276; Bartlett v. Walter, 13 Mass. 267; Laurence v. Sebor, 2 Caines (N. Y.), 203; Oliver v. Greene, 3 Mass. 133.

[69] Williams v. Roger Williams Ins. Co., 107 Mass. 377, per Gray, J.

[70] See Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250; Routh v. Thompson, 11 East, 433; Williams v. Smith, 2 Caines (N. Y.), 19.

[71] Niblo v. North American F. Ins. Co., 1 Sand. (N. Y.) 551; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Sun Fire Office v. Wright, 1 Ad. & E. 621; 3 N. & M. 819; Putnam v. Mercantile Ins. Co., 5 Met. (Mass.) 391.

[72] Cohn v. Virginia F. & M. Ins. Co., 3 Hughes (C. C.), 272.

[73] Kenney v. Clarkson, 1 Johns. (N. Y.) 385; Robertson v. United States, 2 Johns. Cas. (N. Y.) 250; 1 Am. Dec. 166.

[74] Mutual Assur. Co. v. Mahon, 5 Call (Va.), 517.

[75] Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.), 268.

[76] See chapters post, as to description of the subject, and as to representations, warranties, and concealment and conditions.

[77] See chap. lxviii, herein.

[78] Andes Ins. Co. v. Fish, 71 Ill. 620.

[79] Chrisman v. State Ins. Co., 16 Or. 288; 18 Pac. Rep. 466; Dickerman v. Vermont Mut. F. Ins. Co., 67 Vt. 99; 30 Atl. Rep. 808;

is no doubt true that in other than life insurances the interest must exist at the time of loss, and that if it be devested out of the assured by assignment or otherwise, without the company's consent, no recovery may be had,[80] although there are numerous authorities of great weight in favor of the necessity of an insurable interest existing in the insured at the time the insurance is effected. There is no reasonable doubt but that in marine insurances, unless the risks as described in the policy have already commenced, it is only necessary that the interest subsist during the risk, provided it exists at the time of the loss, as where the policy attaches to after-acquired property; as, for instance, where goods are insured on a return voyage long before they are purchased.[81] And in fire risks a policy upon goods purchased after the policy is effected are covered.[82] And crops may be insured against certain risks before they are sown; in such case the contract really attaches in futuro.[83] So it is held that a policy upon livestock renders the company liable for a horse killed while being used in the ordinary course of business, although the horse was bought after the policy was issued.[84] Mr. Arnould,[85] referring to marine insurances, states the rule thus: "It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient." So Mr. Duer, referring to marine risks, declares that "in order to render a party capable of insuring, it is not necessary that he should have any interest in the property insured at the time the insurance is effected, unless

Lynch v. Dalzell, 4 Brown Parl. C. 431; Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 259; French v. Hope Ins. Co., 16 Pick. (Mass.) 397; Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 142, per Story, J.; Harness v. National F. Ins. Co., 1 Mo. App. 473; Howard v. Albany Ins. Co., 3 Denio (N. Y.), 301; Tallman v. Atlantic Ins. Co., 3 Keyes (N. Y.), 87; 4 Abb. Ct. App. 345; Deering's Annot. Civ. Code Cal., sec. 2551.

[80] See secs. 902, 903, herein.

[81] Rhind v. Wilkinson, 2 Taunt. 237.

[82] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44; Wood v. Rutland M. F. Ins. Co., 31 Vt. 552.

[83] See Grant v. Parkinson, 3 Bos. & P. 85, n.

[84] Nutts v. Farmers' Ins. Co., 37 Iowa, 400.

[85] 1 Arnould on Marine Insurance, Perkins' ed., 238, *232; Id., Maclachlan's ed. 1887, 59.

the risks as described in the policy have already commenced. . . . . Insurances on goods and freight are frequently made before the title of the assured is acquired, and the rule that renders them valid extends equally to the ship";[86] and it would seem reasonable that the rule should apply to fire risks as well, and with this statement Mr. Phillips, Mr. May, and Mr. Parsons agree. The first writer says: "There does not appear to be any reason why a fire policy or life policy cannot be made in anticipation of an interest, as well as a marine policy, where there is no concealment or fraud or prejudice to the underwriter. The policy would not, of course, take effect until an interest should accrue." [87] Mr. May says: "There seems to be no sufficient reason why the same principle should not apply to fire policies";[88] and Mr. Parsons, referring to a federal decision,[89] says: "The court thought there was much reason to believe that one having an interest at the time of loss, though none at the time of insurance, ought to be protected, even without an express stipulation to that effect." [90] In case the risk has commenced and the policy is framed "lost or not lost," a person may recover for a loss, even though he did not acquire his interest in the goods till after the loss, and in general such a policy is a valid stipulation for indemnity against past, as

[86] 2 Duer on Marine Insurance, ed. 1845, 4, sec. 4; citing Rhind v. Wilkinson, 2 Taunt. 236.

[87] 1 Phillips on Insurance, 3d ed., sec. 179.

[88] 1 May on Insurance, 3d ed. (Parsons), sec. 100.

[89] Henshaw v. Mutual Safety Ins. Co., 2 Blatchf. (C. C.) 90.

[90] The court in this case said that it considered the following point among others to be incontestably settled, namely: "Whether or not by the general rules of insurance law the fact that the insured party had no insurable interest in the subject insured at the time it was intended the contract should commence its operation, although he possessed such interest at the time of the loss, would render the policy invalid, yet clearly it is competent for the parties to contract with a view to such a condition of things: 3 Kent's Commentaries, 6th ed., 258; 1 Duer on Insurance, 159, 160, note 1; Rogers v. Traders' Ins. Co., 6 Paige, 583, 596. There is, however, strong color at least for the doctrine that the party intended to be insured will be protected if he had an interest at the time of the loss without any express stipulation to that effect, although he had no interest at the commencement of the risk: Hughes on Insurance, 42; 2 Duer on Insurance, 49, sec. 31; Sutherland v. Pratt, 11 Mees. & W. 296; Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132, 140, 142.

well as future, losses, in respect of the interest insured,[91] although the words "lost or not lost" are held not necessary, if both parties to the insurance had no knowledge of the loss at the time.[92]

§ **902. Same Subject—Life Insurance.**—Although it was held at one time that in insurances on lives the insurable interest must exist at the time of the loss, it is now sufficient that there existed a valid interest at the time of effecting the insurance. The fact that such interest ceased before the death of the assured is immaterial, on the question of the right to recover,[93] unless such be the necessary effect of the provisions of the instrument itself. Thus, a divorce does not terminate a wife's interest in a policy effected by husband and wife on their joint lives, payable to the survivor, it appearing that the wife continued payment of the premiums.[94]

§ **903. Continuity of Interest.**[95] — The interest need not be continuous; that is, need not exist at all times from the inception of the risk to its maturity. A temporary suspension of the interest does not invalidate the policy, unless there be a stipulation against alienation or change of interest, and the risk may be subsequently revived.[96] Thus, where the

[91] Hooper v. Robinson, 8 Otto (98 U. S.), 528; Sutherland v. Pratt, 11 Mees. & W. 296, 311, 312, per Parke, B.; Ruggles v. General Ins. Co., 4 Mason (C. C.), 74; Mead v. Davidson, 3 Ad. & E. 303; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; 1 Parsons on Marine Insurance, ed. 1868, 44. See 2 Duer on Marine Insurance, ed. 1846, 5, sec. 5.

[92] See Hammond v. Allen, 2 Sum. (C. C.) 397, per Story, J.; Insurance Co. v. Folsom, 18 Wall. (U. S.) 237; 8 Blatchf. (C. C.) 170; 1 Arnould on Marine Insurance, Perkins' ed., 1850, 26; 1 Id., Maclachlan's ed. 1887, 235, 236; Security F. Ins. Co. v. Kentucky M. & F. Ins. Co., 7 Bush (Ky.), 81; 1 Phillips on Insurance, 3d ed., 501, sec. 925; Hooper v. Robinson (8 Otto), 98 U. S. 537.

[93] Appeal of Corson, 113 Pa. St. 438; 6 Atl. Rep. 213; Mowry v. Home L. Ins. Co., 9 R. I. 346; Sides v. Knickerbocker L. Ins. Co., 16 Fed. Rep. 650.

[94] Connecticut Mut. L. Ins. Co. v. Schaeffer, 4 Otto (94 U. S.), 457; McKee v. Phœnix Ins. Co., 28 Mo. 383, as to validity of assignments of life policies as affecting insurable interest.

[95] See secs. 619, 2239, herein.

[96] "Risks may be temporarily suspended and subsequently revived without invalidating the right of the assured to claim under the

mortgagor of a vessel having parted with his interest upon an agreement to pay off the mortgage, and having failed to fulfill his obligation, the title was reconveyed to him, it was held that an action could be maintained on the policy.[97] In another case the policy provided against alienation, and covered a store and goods therein. The insured leased the store and sold the goods to another, who put his son in possession. A subsequent agreement was made between the parties, whereby the insured was to pay the debts and receive the proceeds of the property, and pay the vendee for his services, the insured holding exclusive possession until the loss. It was held that the policy was not invalidated.[98] Again, where the insured sold the property covered, and the vendee kept possession thereof for a short time, when, having failed to pay for the same, the insured entered into possession and retained it to the time of the fire, a recovery was had against the company on the policy.[99] And it is declared that the risk may be suspended, after the policy has attached, by the temporary unseaworthiness of the vessel, imputable to the neglect or other fault of the assured, and restoration of the navigability of the vessel revives the risk.[100] But in case of loss during such suspension of the interest, recovery on the policy is defeated.[101]

§ 904. Where Interest is Devested—Partial Interest Remaining.—Insurance, as we have seen, is a personal contract, and does not pass with the property, as an incident thereto, unless by assignment or delivery of the policy;[102] and

policy"; Worthington v. Bearse, 12 Allen (Mass.), 382, per Bigelow, C. J. And this is so under Cal. Civ. Code, sec. 2552; contra, Cockerell v. Com. Ins. Co., 16 Ohio, 148; Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423. See sec. 2239, herein, and note.

[97] Worthington v. Bearse, 12 Allen (Mass.), 382.

[98] Lane v. Maine Mut. F. Ins. Co., 3 Fairf. (12 Me.) 44.

[99] Power v. Ocean Ins. Co., 19 La. (O. S.) 28.

[100] Worthington v. Bearse, 12 Allen (Mass.), 382, per the court. But see chapter xlviii herein; Taylor v. Lowell, 3 Mass. 331; 1 Phillips on Insurance, 3d ed., 406, sec. 734.

[101] Fogg v. Middlesex Ins. Co., 10 Cush. (Mass.) 337, 345; Wilson v. Hill, 3 Met. (Mass.) 66.

[102] Powles v. Inness, 11 Mees. & W. 10; Lynch v. Dalzell, 4 Brown Parl. C. 431.

it is held that at common law a contract of insurance is not assignable, so as to give an action to the assignee in his own name.[103] So if the insurable interest in property be entirely and absolutely devested before the loss happens, there can be no recovery; for it is necessary that the interest exist at the time of the loss.[104] But if at the time of the loss a partial interest remains, recovery may be had to that extent.[105] The principal rule is, however, subject to whatever exceptions may arise by virtue of a valid assignment of the policy,[106] where there is a corresponding change of interest in the thing insured.[107] So the assignment of a policy as collateral carries only a de-

[103] Shepherd v. Union etc. Ins. Co., 38 N. H. 232, 237; Ripley v. Ætna Ins. Co., 29 Barb. (N. Y.) 552; Bayles v. Hillsborough Ins. Co., 27 N. J. L. (3 Dutch.) 163.

[104] Ayres v. Home Ins. Co., 21 Iowa, 185; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 397; Boynton v. Clinton etc. Ins. Co., 16 Barb. (N. Y.) 254; Jackson v. Massachusetts Ins. Co., 23 Pick. (Mass.) 418; Lane v. Maine Mut. F. Ins. Co., 12 Me. (3 Fairf.) 44, 49; Dollero v. St. Joseph F. & M. Ins. Co., 9 Ins. L. J. 293, note; Murdock v. Chenango Co. Ins. Co., 2 N. Y. 216; Bailey v. Ætna Ins. Co., 10 Allen (Mass.), 286; Carroll v. Boston Mar. Ins. Co., 8 Mass. 515; McCarty v. Commercial Ins. Co., 17 La. (O. S.) 365; Howard v. Albany Ins. Co., 3 Denio (N. Y.), 301; Read v. Mutual Safety Ins. Co., 3 Sand. (N. Y.) 54; Bates v. Equitable Ins. Co., 10 Wall. (U. S.) 33. "A sale or transfer of the property insured . . . . although not accompanied by an assignment of the policy, never operates to defeat the contract unless it is absolute in its nature, and wholly divests the interest that was originally meant to be covered": 2 Duer on Marine Insurance, ed. 1846, 55, sec. 34.

[105] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 397; Cowan v. Iowa State Ins. Co., 40 Iowa, 551; Jackson v. Massachusetts Ins. Co., 23 Pick. (Mass.) 418; Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177. But see Atherton v. Phœnix Ins. Co., 109 Mass. 32.

[106] It is held that an assignment of the policy is valid in the absence of a condition to the contrary: Earl v. Shaw, 1 Johns. Cas. (N. Y.) 314; 1 Am. Dec. 117. As to validity of assignment of same and life policies, see Alexander v. Campbell, 41 N. J. Ch. 478; Earl v. Shaw, 1 Johns. Cas. (N. Y.) 314; 1 Am. Dec. 17; 1 Phillips on Insurance, 3d ed., 57, sec. 76, et seq.; New York L. Ins. Co. v. Flack, 3 Md. 341; St. John v. American Mut. L. Ins. Co., 13 N. Y. 31; 2 Duer on Marine Insurance, ed. 1846, 55, 57, et seq.; and chap. li, herein, on assignments, etc.

[107] Under the California code, except in certain specified cases, "and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a cor-

feasible right, which terminates by the payment of the debt.[108] So in case of an assignment in trust for the payment of his debts, the insured has nevertheless an insurable interest, which covers the whole value of the property insured,[109] and even though the policy prohibits an assignment unless made with the insurer's consent, such act does not avoid it when made under the bankrupt law to the official assignee;[110] although if the debt is discharged thereby, as where the creditors release their demands, the rule would seem to be otherwise, unless he shows that the property assigned is of greater value than the amount of his debts.[111] Even an assignment absolute on its face may be controlled by extrinsic evidence showing its real intent; as where a bill of lading is transferred to a creditor, it may be shown that its indorsement was not intended to transfer the whole property, but merely as a security to enable him to receive the net proceeds, and upon payment of the debt in such case a recovery may be had for the whole amount of the insurance.[112] So in New York, it is held that if a policy of insurance is assigned as a security, witnesses may be called to tes-

responding change of interest in the insurance, suspends the insurance to an equivalent extent until the interest in the thing and the interest in the insurance are vested in the same person": Deering's Annot. Civ. Code Cal., sec. 2553. See Smith v. Saratoga Mut. F. Ins. Co., 3 Hill (N. Y.), 508; 1 Hill, 497.

[108] Robert v. Traders' Ins. Co., 17 Wend. (N. Y.) 631; 9 Wend. (N. Y.) 474. See Alston v. Campbell, 4 Brown Parl. C. 476. "Where the property is merely pledged as a collateral security for the payment of a debt for which the assured continues personally liable, he retains his insurable interest, and the denial of his right to recover on the policy would deprive him of the indemnity it was meant to secure": 2 Duer on Marine Insurance, ed. 1846, 55, 56, sec. 34.

[109] Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76, 81; 19 Pick. (Mass.) 81; Gourdon v. Insurance Co. of North America, 1 Binn. (Pa.) 430; 3 Yeates (Pa.), 327. But see Dey v. Poughkeepsie Mut. Ins. Co., 23 Barb. (N. Y.) 623.

[110] Starkweather v. Cleveland Ins. Co., 2 Abb. (C. C.) 67.

[111] Lazarus v. Commonwealth Ins. Co., 19 Pick. (Mass.) 81; 2 Duer on Marine Insurance, ed. 1846, 56, 57.

[112] Hibbert v. Carter, 1 Term. Rep. 745. "In such a case, although the transfer may be absolute on its face, extrinsic proof may be received to explain its real intent and control its operation": 2 Duer on Marine Insurance, ed. 1846, 55, 56, sec. 34.

tify to the purpose for which the policy was assigned,[113] although evidence of such a payment is unnecessary, for it is sufficient that the personal liability of the assured continues. This preserves his insurable interest and sustains the validity of the contract. Thus, in a case of an insurance "for whom it might concern," the ship being valued, the owner made an absolute bill of sale to another, by virtue of which the proceeds of the vessel were to stand as a security in favor of the vendee for indorsing for the insured; the balance remaining was to be appropriated for the benefit of the insured in payment of a creditor. Subsequently, an additional transfer of property was made for the purposes above specified, evidenced by a writing under seal substituted for the original memorandum. Upon a loss, it was held that a recovery could be had for the personal liability of the assured, for the debts still existed, except so far as they should be discharged by the proceeds of the policy, and his insurable interest was preserved.[114] So in another case, the person in whose name the policy was made had borrowed money to buy a cargo, and assigned it to the lender, made an invoice of it, and took the bill of lading in the latter's name, who was to receive the insurance—the debt to be taken from the proceeds thereof, and the balance given the insured, the assignment and insurance being a pledge for the security of the money borrowed. If such amount of insurance were insufficient to cancel the debt, the insurer was to be liable for the balance, and it was held that an insurable interest subsisted in the insurer.[115] But in a Massachusetts case,[116] the insured schooner was conveyed by a bill of sale to another, who enrolled her in his name. Subsequently, the vessel was lost, and it was held that evidence was inadmissible to show that the conveyance was fraudulent, and that it was intended as security against loss on a bond. In cases of life risks, the interest need not exist at the time of loss.[117] And in general, in cases of property

[113] Allen v. Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442.

[114] Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249.

[115] Locke v. North American Ins. Co., 13 Mass. 61. See, also, Higginson v. Dall, 13 Mass. 96.

[116] Carroll v. Boston Mar. Ins. Co., 8 Mass. 515.

[117] See sec. 902, herein.

the interest at the time of the loss need not be identical with that existing at the time of the insurance.[118] The interest may be devested by an alienation of the property, by sale, or otherwise;[119] but, it seems, not by a stoppage of the goods in transitu, since the weight of authority apparently sustains the proposition that a stoppage in transitu does not rescind the sale, but is a mere right of the vendor to resume possession of the goods, and the vendee may claim them on payment of the price.[120] And if the vessel is bottomried for a certain amount, as to that amount the insured ceases to have an insurable interest, since this is in effect a sale to that amount;[121] or if the amount for which she is bottomried exceeds her value, no interest remains.[122] And the interest may be devested in case of a donatio inter vivos, notwithstanding an agreement between the donor and donee that the rents should be received and enjoyed by the former, which was done.[123] But the interest will not be devested by reason of a contract to sell, where neither the purchase money is received nor a conveyance made;[124] nor will it be devested by an illegal capture of the property, although there

[118] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[119] Fogg v. Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 337, and cases under note 104 above.

[120] Examine Rowley v. Bigelow, 12 Pick. (Mass.) 307; Wentworth v. Outhwaite, 10 Mees. & W. 452; Jordan v. Jarvcis, 5 Ohio, 98; Chitty on Contracts, 11th Am. ed., 601; 1 Arnould on Marine Insurance, Perkins' ed., 260, *255, et seq., where this question is discussed; 1 Parsons on Marine Insurance, ed. 1868, 233, n. 1, where the English and American cases are collated; 2 Kent's Commentaries, 5th ed., 541. "The stoppage of goods in transitu does not operate to rescind the contract of sale, but only to revest in the vendor that possession which is the sole foundation for his equitable lien on the goods for the purchase money. The vendee, therefore, at any time after stoppage may recover the goods upon payment or tender of the price; and the vendor may maintain an action for goods bargained and sold, notwithstanding the stoppage in transitu, if he be ready to deliver them up to the vendee upon payment": Story on Contracts, 4th ed., sec. 815.

[121] Read v. Mutual Safety Ins. Co., 3 Sand. (N. Y.) 54.

[122] Smith v. Williams, 2 Caines Cas. (N. Y.) 110.

[123] McCarty v. Commercial Ins. Co., 17 La. (O. S.) 365.

[124] Perry County Ins. Co. v. Stewart, 19 Pa. St. 45.

be a condemnation in a foreign port and a sale thereunder.[125] If the vessel is captured, the insurable interest is not devested until condemnation,[126] and the fact that the insured has parted with his interest, or assigned the policy after the loss, does not defeat a recovery;[127] and even though the policy prohibit an assignment, transfer, or sale after loss, such condition is null and void, as inconsistent with the covenant of indemnity, and as contrary to public policy.[128] Some question has arisen upon the point whether, in case of forfeiture of the subject of insurance to the government, by reason of some breach of statutory provision expressly or impliedly prohibiting the act for which the forfeiture is claimed, the insurable interest is devested at that instant when the illegal act is done, or not until seizure, or perhaps until actual forfeiture is declared. Mr. Phillips says: "The established doctrine is, that in general . . . . the owner is not devested of his property by an act of forfeiture until seizure therefor; that is to say, after the act of forfeiture the owner holds a precarious title, subject to be devested."[129] Mr. Par-

[125] The Arrogante Barcelones, 7 Wheat. (U. S.) 496; The Gran Parra, 7 Wheat. (U. S.) 471.

[126] Lucena v. Crawford, 5 Bos. & P. 319, per Lord Eldon; The Arrogante Barcelones, 7 Wheat. (U. S.) 496.

[127] Carter v. Humboldt Ins. Co., 12 Iowa, 287; Walters v. Washington Ins. Co., 1 Iowa, 404; Buchta v. New York La Fayette Ins. Co., 2 Hall (N. Y.), 372; Miller v. Hamilton Ins. Co., 17 N. Y. 609; Stetson v. Massachusetts Mut. F. Ins. Co., 4 Mass. 330, 336, 337; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Pennebaker v. Tomlinson, 1 Tenn. Ch. 598; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Goit v. National etc. Ins. Co., 25 Barb. (N. Y.) 189; Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 142.

[128] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Alkan v. New Hampshire Ins. Co., 53 Wis. 136; Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292; 38 Barb. (N. Y.) 402; 1 Abb. Dec. (N. Y.) 316; Courtney v. New York City Ins. Co., 28 Barb. (N. Y.) 116; Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189. See Mershon v. National Ins. Co., 34 Iowa, 87.

[129] 1 Phillips on Insurance, 3d ed., 124, sec. 195; citing Ripon v. Cope, 1 Camp. 434; Williams v. Despard, 5 Term. Rep. 112; United States v. The Anthony Mangin, 3 Cranch (U. S.), 356, n.; 7 Pet. Adm. (U. S.) 452, per Winchester, J.; and also noting Clark v. Protection Ins. Co., 1 Story (C. C.), 109, per Story, J.; Fontaine v. Phœnix Ins. Co., 1 Johns, (N. Y.) 293; United States v. Grundy, 3 Cranch (U. S.),

sons says: "It is difficult to determine the question positively upon authority. We, however, are strongly disposed to hold, on general principles, that the insurable interest continues until seizure, and we add until condemnation." [130] Mr. Duer declares that "in all cases where by the violation of a law of trade the property insured is subjected to forfeiture, the insurers are doubtless discharged." [131] The rule which seems to be the most consistent with the reason, justice, and policy of the law is that the title to the property forfeited is not devested at the instant of forfeiture, and immediately vested in the government, but remains in the owner until actual seizure, when it relates back to the time of forfeiture. This is the opinion of Mr. Justice Story,[132] and it is evidently upon this opinion that Mr. Phillips relies, as he quotes therefrom in the text. In an Illinois case the property was seized, and it was held that the insured was entitled to recover, there being no condemnation or forfeiture.[133] But other decisions are opposed to the above conclusion.[134]

§ **905. The Interest Need not be Indefeasible.**—The fact that the interest is such that it may be defeated or made void, does not prevent its being insurable,[135] and an interest does not cease to be insurable in the progress of the voyage simply because it is subject to contingencies, or has not at the moment anything corporeal or tangible to which it is attached,[136] and it is held that if a person has an interest in goods during the voyage to the amount insured, the policy being effected "lost or not lost," and the assured claims for an average

37; Gelston v. Hoyt, 3 Wheat. (U. S.) 311; United States v. 1960 Bags Coffee, 8 Cranch (U. S.), 398; The Mars, 8 Cranch (U. S.), 417; Lockyer v. Offley, 1 Term. Rep. 160, and other cases.

[130] 1 Parsons on Marine Insurance, ed. 1868, 239, 240.

[131] 2 Duer on Marine Insurance, ed. 1845, 319, sec. 8.

[132] In Clark v. Protection Ins. Co., 1 Story (C. C.), 109.

[133] Keith v. Globe Ins. Co., 52 Ill. 518.

[134] See United States v. 1960 Bags of Coffee, 8 Cranch (U. S.), 398; United States v. The Mars, 8 Cranch (U. S.), 417. See chapter liv, sec. 2542, herein.

[135] Sterling v. Vaughan, 11 East, 629, per Lord Ellenborough, and see cases under last section.

[136] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132.

loss, it is no answer to aver that the interest in the goods was not acquired till after the loss.[137]

§ **906. Obligation of Insurer to Ascertain Insurable Interest in Property.** — It is obligatory upon the insurer, under the valued policy law of Ohio, to ascertain the applicant's insurable interest in the structure or building, and fix the value.[138]

SUBDIV. II. Particular Insurable Interests.

§ **912. Different Parties — Several Interests.**—Different parties, having different interests in the same subject matter, may severally procure insurance of their several interests.[139] Thus, persons having an absolute property in ships or goods, as well as those having a qualified property, or a legal or equitable interest in the same, may insure them; in brief, every valid insurable interest in the same property, although based upon entirely distinct grounds or arising from different sources, may be protected, and one interested with others, as in case of copartners, joint owners, trustees, and the like, may severally protect their own interest;[140] and one having an interest as partner or consignee of the whole, and also having a lien for advances, may insure the whole in one insurance.[141] So a general and special owner may each insure separately, and recover separately pro interesse suo.[142]

§ **913. Interest of Administrators and Executors.**— In the case of administrators, where the personal estate of the deceased is insufficient to pay the debts, the administrator may

[137] Sutherland v. Pratt, 11 Mees. & W. 296; 1 Arnould on Marine Insurance, Perkins' ed. 1850, p. 240, *233; Id., Maclachlan's ed. 1887, 60.

[138] Henderson v. Ohio Farmers' Ins. Co., 2 Ohio Dec. 189.

[139] Higginson v. Dall, 13 Mass. 96; Insurance Co. v. Thompson, 95 U. S. 574; Locke v. North American Ins. Co., 13 Miss. 61; Garrall v. Hanna, 5 Har. & J. (Md.) 402; Carruthers v. Sheddon, 6 Taunt. 14; Smith v. Lascelles, 2 Term Rep. 188, per Ashhurst, J.; Godin v. London Assur. Co., 1 Bur. 489; 1 Bl. 103.

[140] For illustrations, see sections following.

[141] Carruthers v. Sheddon, 6 Taunt. 14.

[142] Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546.

insure the real estate; he has, under these circumstances, at least an insurable interest.[143] So the administrator of an insolvent estate has an insurable interest in buildings on it against fire. If, however, the administrator insure in such case, it is for the benefit of the creditors.[144] But an administratrix who continues an insurance upon real property effected by the intestate cannot, it is held, recover thereon, for she has no insurable interest in the property.[145] Executors have an insurable interest in property under their care and protection,[146] and where the original policy was taken out by the testator, and the executor renewed the same from year to year, it was held that the contract was not terminated by the testator's death, and that a recovery could be had thereon.[147] So in case of a life risk, the testator, who was brother of the executor, had been granted an annuity by H. The annuity was bequeathed to persons not parties to the insurance, and the executor was directed to insure the life of H., which he did, and it was held that the executor had a sufficient insurable interest to support an action.[148] And where the testator was a creditor of another, the former's executor has an insurable interest in the latter's life.[149]

§ 914. Whether Assignee of Life Policy Must have an Insurable Interest.—The question whether the assignee of a life policy must have an insurable interest in the life insured to entitle him to recover, is one in which the decisions are seemingly, if not actually, irreconcilable. It is urged in the cases sustaining the proposition that it is certain that no person can procure a valid insurance upon the life of another, unless he has an insurable interest in such life; policies issued, where there is no such interest, being deemed mere wagers, and

[143] Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

[144] Herkimer v. Rice, 27 N. Y. 163.

[145] Beach v. Bowery F. Ins. Co., 8 Abb. Pr. (N. Y.) 261. note.

[146] See Savage v. Harvard Ins. Co., 52 N. Y. 502; Phelps v. Gebhard F. Ins. Co., 9 Bosw. (N. Y.) 404; Insurance Co. v. Chase, 5 Wall. (U. S.) 509; Tidswell v. Ankerstein, Peake, 204.

[147] Phelps v. Gebhard F. Ins. Co., 9 Bosw. (N. Y.) 404.

[148] Tidswell v. Ankerstein, Peakes N. P. C. 204, per Lord Kenyon.

[149] Garner v. Moore, 3 Drew. 277.

void. It is also claimed that if this rule is followed to its logical conclusion, it would seem to arbitrarily preclude an assignment to one who has no insurable interest in the life covered by the policy. It would also seem that if such an assignee were permitted to recover, it would establish a precedent which would be made the ground for an evasion of the rule as to wagers, and in the latter case it would amount simply to this, that although one has no insurable interest in the life of another, and cannot procure an insurance on such life which would be valid, nevertheless he may completely evade the rule against gambling policies, and obtain a valid and enforceable right, by virtue merely of an assignment of the policy to himself, the insured himself having effected the insurance. Again, there would seem to be no valid reason why an assignment of such a policy, in such case, would not be equally as much against public policy, as if the insurance had been originally taken out by one who had no insurable interest in the life of the insured. Such assignee would hardly have a greater desire that the life should continue, than he would had the policy had been originally issued to him, he having no insurable interest in either case. On the other side, it is said that while no one can have an insurance upon the life of another, unless he has an insurable interest therein at the time of effecting the policy, it is not necessary to the continuance of the insurance that the interest should continue; that if the interest should cease, the policy would continue, and the insured would then have a policy without interest.[150] It is also claimed that a life policy is assignable, absolutely or by way of security, the same as any other chattels, since it is a mere chose in action.[151] And an early writer[152]

[150] Mutual L. Ins. Co. v. Allen, 138 Mass. 31, per Shadwell, V. C., who also says: "The value and permanency of the interest is material only as bearing on the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception, it will not be avoided by cessation of the interest."

[151] New York L. Ins. Co. v. Flack, 3 Md. 341; 36 Am. Dec. 742; Sonder v. Home Friendly Soc., 72 Md. 511; 20 Atl. Rep. 137; Palmer v. Merrill, 6 Cush. (Mass.) 282; 52 Am. Dec. 782. He may assign or dispose of the same as he may of any other chose in action, if there is nothing in the terms of the policy to prevent: Murphy v. Red,

says that they should be assignable without notice to the insurers.[153] So in Tennessee it is held that, as between the insurer and assignee of a life policy, notice of the assignment to the former is not necessary, in the absence of a contract requirement to that effect, to entitle the assignee to recover, and that no such contract is evidenced by a mere memorandum at the foot of the policy that "if assigned, notice is to be given to the company." [154] It is also held that a policy may, in general, be validly assigned, unless prohibited by its terms; [155] and that the policy being valid at its inception, and containing nothing to prevent an assignment, the assignee or a purchaser for a valuable consideration may recover, although he has no insurable interest in the life.[156] So in Colorado, it is declared that a life policy is a chose in action, assignable like any other chose in action, and may be transferred absolutely or hypothecated as security, and may be dealt with in any manner deemed fit by the owner.[157] And in Ohio, the rule is not limited to contract

64 Miss. 614; 1 S. W. Rep. 761; citing Clark v. Allen, 11 R. I. 439; St. John v. American Mut. L. Ins. Co., 13 N. Y. 31; Mutual L. Ins. Co. v. Allen, 138 Mass. 24; Vatton v. Assurance Co., 20 N. Y. 32; Olmstead v. Keys, 85 N. Y. 134, note; Bensinger v. Bank etc., 30 N. W. Rep. 290; 1 S. W. Rep. 761. "The party owning and holding such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign either absolutely or by way of security, and it is assignable like any other chose in action": Hutson v. Merrifield, 5 Ind. 24, per the court. An insurance policy is a chose in action, and assignable only in equity. An assignee of a policy cannot sue in law in his own name: United States L. Ins. Co. v. Ludwig, 103 Ill. 305. And see sec. 904, note, herein.

[152] Ellis on Insurance, 152, 153.

[153] "Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required": Deering's Annot. Civ. Code Cal., sec. 2765.

[154] Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269.

[155] Earl v. Shaw, 1 Johns. Cas. (N. Y.) 31.

[156] Murphy v. Red, 64 Miss. 614; 1 S. Rep. 761; citing Dalby v. India Assur. Co., 15 Com. B. 365; Law v. London Policy Co., 1 Kay & J. 223; Connecticut Ins. Co. v. Schaefer, 94 U. S. 457; Rawls v. American Ins. Co., 27 N. Y. 282; Provident Ins. Co. v. Baum, 29 Ind. 236; Currier v. Continental Ins. Co., 52 Am. Rep. 134, note. See, also, Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496.

[157] Sheets v. Sheets, 4 Colo. 450, 454; 36 Pac. Rep. 310, citing Bliss on Life Insurance, 506; Hutson v. Merrifield, 51 Ind. 34; Ashley v.

prohibitions, but extends to statutory ones.[158] So it is claimed in this connection that a person has an insurable interest in his own life, and the policy being therefore valid in his hands, he may make such disposition of it as he chooses.[159] In Pennsylvania, it is decided that if the assignor parts with all control over the policy under a life risk by an absolute assignment, and the assignee has no interest in the life, he cannot recover.[160] But it was also held in this last case that an assignee has an insurable interest in a policy taken out by insured on his own life, where such assignee, a young girl, has been befriended by assured, and her expenses for education have been paid by him, she having rendered, for small remuneration, slight services for him, and that this is so even though she is of no kin to assured.[161] Again, there has been much discussion as to whether wagers were valid at common law,[162] and in New York, the statute 14 George III., chapter 48, in so far as it prohibits such insurances, has been held merely declaratory.[163] It is held in North Carolina that if a fire policy is procured without false representations, that it may be validly assigned with the company's consent to one having no insurable interest in the property.[164] Some of the cases, in considering this question, make the right of the assignee to recover to depend upon the fact whether the transaction was an honest and bona fide one, and not a contrivance to circumvent the law.[165] And there is no

Ashley, 3 Simons (Eng. Ch.) 149; St. John v. Insurance Co., 13 N. Y. (3 Kern.) 31; St. John v. Insurance Co., 2 Duer (N. Y.), 419; Palmer v. Merrill, 6 Cush. (Mass.) 282.

[158] Eckel v. Renner, 41 Ohio St. 232.

[159] Vatton v. National Loan Fund L. Assur. Soc., 20 N. Y. 32.

[160] Carpenter v. United States L. Ins. Co., 161 Pa. St. 9; 28 Atl. Rep. 943; 23 L. R. Annot. 571.

[161] Carpenter v. United States L. Ins. Co., 161 Pa. St. 9; 28 Atl. Rep. 943; 23 L. R. Annot. 571.

[162] Trenton Mut. L. & F. Ins. Co. v. John, 4 Zab. (24 N. J. L.) 576. See sec. 891, herein.

[163] Ruse v. Mutual B. Ins. Co., 23 N. Y. 516. See sec. 891, herein.

[164] Blackburn v. St. Paul F. & M. Ins. Co., 116 N. C. 821; 21 S. E. Rep. 922.

[165] Clark v. Allen, 11 R. I. 439; Connecticut Ins. Co. v. Schaefer, 94 U. S. 457, per Bradley, J. See Langdon v. Mutual L. Ins. Co., 14 Fed. Rep. 272.

doubt but that if the assignment clearly appears to be a mere cover for what is denominated a wager, the assignee having no insurable interest, it would be void.[166] So in a federal case it is held that one not the wife, child, brother, sister, or creditor of assured may have an insurable interest in the life;[167] and also that one may insure his own life and designate another as payee, and the latter need not prove an insurable interest.[168]

§ 915. Same Subject—Payment of Premium as a Factor. An important factor arises in the consideration of this question, which is presented by the case where the premium is paid by the assignee. It is held that if one insures his life for the benefit of another, and pays the premiums himself, an insurable interest in the assignee is unnecessary;[169] and it is also decided that if one acting bona fide insures his life, and, being unable to pay the premium, another pays it for him, an assignment to the latter is valid.[170] But where the insured assigned his policy to a trust association, on agreement that the latter should pay all dues and assessments, and receive a certain proportion of the amount payable under the contract of insurance, it was held that the assignment was void, and the agreement was in the nature of a wager policy.[171] So an assignment of such a policy is held void, made by the assured to his cousin, although the assignee agrees to pay the assessments, and although he lives with the assured as a member of his family, and is dependent upon him for support and employment, it being declared that the policy should be paid to the original beneficiaries.[172] A

[166] See Cammack v. Lewis, 15 Wall. (U. S.) 643; Warnock v. Davis, 104 N. Y. 775. See Stevens' Admr. v. Warner's Admr., 101 Mass. 566.

[167] Kentucky L. & A. Ins. Co. v. Hamilton, 11 U. S. C. C. A. 42; 63 Fed. Rep. 93; 24 Ins. L. J. 43.

[168] Robinson v. United States Mut. Acc. Assn. (C. C. E. D., Mo. 1895), 68 Fed. Rep. 825.

[169] Mallory v. Travelers' Ins. Co., 47 N. Y. 52; Scott v. Dickson, 108 Pa. St. 6; Campbell v. M. E. Mut. L. Ins. Co., 98 Mass. 381; contra, Holabird v. Atlantic Mut. L. Ins. Co., 2 Dill. (C. C.) 166.

[170] Vezina v. New York L. Ins. Co., 6 Can. Supr. Ct. 30; overruling 25 L. C. Jur. 232.

[171] Warnock v. Davis, 104 N. Y. 775.

[172] Price v. Knights of Honor, 68 Tex. 361; 4 S. W. Rep. 633.

Pennsylvania case,[173] however, goes to the extent of holding that the assignment is valid where the person takes out an insurance on his own life, and pays for it with the money of another, intending to assign the policy to him, which is done. Exactly where the line can be drawn between such a transaction and one where the policy is taken out by the procurement of the assignees, in order that it may be assigned, which latter has been declared void, as an evasion of the law against wagers,[174] it is difficult to determine, and with all due respect to the court in that case, we suggest that the decision is certainly open to serious objections, unless possibly it could be based upon the ground that the assignees had a valid interest in the life insured, subsisting in him at the time the policy was effected; although the decision did not turn upon this point.

§ 916. Same Subject—Consent of Insurers to the Assignment.—Again, it is held that a man may take out a policy of insurance on his life in the name of anyone, or having taken it out in his own name he may, with the consent of the insurers, transfer it to whom he pleases.[175] And in Wisconsin it is declared that if a policy is taken out in good faith by a person having an insurable interest in the life, it may, with the consent of the company, be assigned to any person.[176] Again, in a federal case it is held that where the policy was assigned to A, in payment of a debt, and A assigned to B, and B to C, the question of insurable interest was immaterial, the company not having contested the interest.[177] Although it is said that if the assignee has no insurable interest in the life, the assignment, with the insurer's consent, operates only as a designation by agreement of the person entitled to receive the proceeds, instead of the personal representatives of the deceased, and that even in such case if the transaction was a mere cover for a speculating risk, contrary to public policy, it would not

[173] Cunningham v. Smith, 70 Pa. St. 450.

[174] Cammack v. Lewis, 15 Wall. (U. S.) 643; Warnock v. Davis, 104 U. S. 775.

[175] Succession of Hearning, 26 La. Ann. 326.

[176] Bursinger v. Watertown Bank, 67 Wis. 75; 78 Am. Rep. 848.

[177] Connecticut M. L. etc. Co. v. Fisher, 30 Fed. Rep. 662.

be upheld.[178] In another case the insured, having failed to pay the premiums, notified the company that he would not keep up the policy, but it was subsequently, with the assurer's consent, assigned for a money consideration to another, who had no insurable interest in the life insured. The assignee paid the premiums, the same being received by the company, and the assignment was declared void, as purchased upon speculation.[179]

§ 917. **Same Subject—Mutual Benefit Societies.**—In regard to mutual benefit societies, it is declared in Alabama that a contract for the sale of its certificates to one who has no insurable interest is void as against public policy, as well as being contrary to a rule of the society forbidding the sale thereof for a consideration.[180] So in Texas, it is held that an assignment of a benefit certificate to one who has no interest, but has merely advanced fifty dollars to the member assigning, is void, and that the fund goes to the heirs, subject to a deduction for the money advanced.[181] And in a federal case it is held that a member of a mutual benefit society may transfer the benefits to be paid under his certificate to anyone, even though the transferee had no insurable interest, the rules of the society providing that the benefits should be paid to the party designated by the member in his application or by his will, and the case also holds that such transfer is valid even without a designation by will.[182]

§ 918. **Same Subject — Conclusion.**—In addition to what we have stated at the beginning of this discussion upon

[178] Stevens v. Warren, 101 Mass. 564, per the court.

[179] Franklin Ins. Co. v. Hazzard, 41 Ind. 116; affirmed, Franklin Ins. Co. v. Sefton, 53 Ind. 380.

[180] Stoelker v. Thornton, 88 Ala. 241; 6 S. Rep. 680.

[181] Schonfield v. Turner, 75 Tex. 324; 12 S. W. Rep. 626. See, also, cases under sections relating to parties claiming an interest by reason of consanguinity and affinity under this chapter.

[182] Lamont v. Hotel etc. Assn., 30 Fed. Rep. 817. See further as to mutual benefit societies, chapters xxv, xxvi, herein, on beneficiaries. See, also, chapter on assignments and alienation. See, however, insurable interest under chapter on beneficiaries, herein.

the question of assignment to one having no insurable interest in the life, the authorities considered present these points: 1. Where a party having an insurable interest in his own life, and the policy therefor being valid when effected, it is assigned, there being nothing in its terms to prevent a valid assignment; 2. Where the policy being valid at its inception, for the same reasons the transaction is in addition an honest and bona fide one, and not a mere cover for a speculation in contravention of the law and public policy; 3. Where the assignment is made by a person who took out the policy in good faith upon another's life; 4. Where the transaction is from its inception a mere cover for a wager; 5. Where the premium is paid by the person to whom it is assigned, the parties acting in good faith; 6. Where the premium is paid by another, to whom it is intended at the time to assign the policy; 7. Where the policy is procured with the intent to assign the same under circumstances evidencing it to be an evasion of the law and against public policy; and 8. Where it is assigned with the consent of the insurers. So that although there is a lack of unanimity in the decisions, the general rule may be deduced that if the transaction appears to have been at its inception, a mere cover for a wager, or as a mere matter of speculation, without interest in the life of the insured, the assignee cannot recover. And the weight of authority seems also to favor the proposition that if a person effects a valid insurance upon his own life, and the transaction is bona fide and not intended to circumvent the law, the assignment to another will be upheld, even though the assignee has no insurable interest in the life insured. Thus, in the case of Amick v. Butler,[183] the court, per Mitchell, J., says: "A person may insure his own life . . . . or having taken a policy valid in its inception, that he may in good faith assign his interest in such policy as in any other chose in action.[184] In

[183] 111 Ind. 578.

[184] Citing Hutson v. Merrifield, 51 Ind. 24; Franklin L. Ins. Co. v. Sefton, 53 Ind. 389; Ashley v. Ashley, 3 Sim. 149; Mutual L. Ins. Co. v. Allen, 138 Mass. 24; Clark v. Allen, 11 R. I. 439, note to same, 17

either case the essential point is, that the transaction be bona fide, or not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law.[185] The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain merely speculative insurances." [186] So it is held in Pennsylvania that an assignee of a wagering life policy who collects the proceeds must account to the personal representatives of the insured.[187] And in another case in the same state it is declared that the assignee, with no insurable interest, can only retain out of the proceeds of the policy the sums paid out by him to the assured and assurer, with interest thereon.[188] In Rhode Island, the sales and assignments are held valid, provided the transaction is bona fide and not to evade the law,[189] and in Connecticut the same consideration controls.[190]

§ 919. Same Subject—Summary of the Decisions.—Such assignments are valid in California,[191] Canada,[192] Colo-

Am. Law Reg. 86; New York Mut. Ins. Co. v. Armstrong, 117 U. S. 591; Archibald v. Mutual Ins. Co., 38 Wis. 542; Eckel v. Renner, 41 Ohio St. 232.

[185] Citing Provident etc. Ins. Co. v. Baum, 29 Ind. 236; Olmstead v. Keyes, 85 N. Y. 593; Campbell v. New England etc. Co., 98 Mass. 381; Connecticut Mut. Ins. Co. v. Schaefer, 94 U. S. 457; Guardian etc. Co. v. Hogan, 80 Ill. 35; Murphy v. Red, 35 Alb. Jun. J. 490; 64 Miss. 614; Cunningham v. Smith, 70 Pa. St. 450.

[186] Citing Franklin Ins. Co. v. Hazzard, 41 Ind. 116; Cammack v. Lewis, 15 Wall. (U. S.) 643; Warnock v. Davis, 104 U. S. 775.

[187] Stambaugh v. Blake (Pa.), 15 A. 705.

[188] Donney v. Hoffer, 110 Pa. St. 109; 20 Atl. Rep. 655.

[189] Clark v. Allen, 11 R. I. 439; 23 Am. Rep. 496.

[190] Fitzpatrick v. Hartford L. etc. Ins. Co., 1 Conn. 636; 6 New Eng. 180.

[191] "A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might recover": Deering's Annot. Civ. Code Cal., sec. 2764.

[192] North American L. Assur. Co. v. Craigen, 13 Can. S. C. 278; 6 Russ. & Geld. (Nov. Sco.) 440; contra, Michaud v. British Med. Assn., Ramsey's App. Cas. (Low. Can.) 377; New York L. Ins. Co. v. Parein, 3 Q. L. R. 163.

rado,[193] Connecticut,[194] England,[195] Illinois,[196] Indiana,[197] Maryland,[198] Massachusetts,[199] Mississippi,[200] New York,[201] North Carolina,[202] Ohio,[203] Rhode Island,[204] Vermont,[205] Wisconsin,[206] and in the United States courts.[207] Such assignment

[193] Sheets v. Sheets, 4 Colo. 450, 454; 36 Pac. Rep. 310.

[194] Fitzpatrick v. Hartford L. etc. Ins. Co., 1 Conn. 636; 6 New Eng. Rep. 180.

[195] Ashley v. Ashley, 3 Sim. 149.

[196] Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 625; Bloomington Mut. B. Assn. v. Blue, 120 Ill. 121; 60 Am. Rep. 558; 11 N. E. Rep. 331; 8 West. Rep. 642. See United States L. Ins. Co. v. Ludwig, 103 Ill. 305.

[197] Amick v. Butler, 111 Ind. 578; contra, Franklin L. Ins. Co. v. Sefton, 53 Ind. 380; Franklin L. Ins. Co. v. Hazzard, 41 Ind. 120; 13 Am. Rep. 313.

[198] Sonder v. Home Friendly Soc., 72 Md. 511; 20 Atl. Rep. 137; contra, Franklin L. Ins. Co. v. Sefton, 53 Ind. 380.

[199] Mutual L. Ins. Co. v. Allen, 138 Mass. 31; Troy v. Sargent, 132 Mass. 408; Campbell v. New England Ins. Co., 98 Mass. 381; Palmer v. Merrill, 6 Cush. (Mass.) 282; 52 Am. Dec. 782; contra, Stevens v. Warren, 101 Mass. 564.

[200] Murphy v. Red, 64 Miss. 614; 1 S. Rep. 761.

[201] Olmstead v. Keyes, 85 N. Y. 593; Glassey v. Metropolitan L. Ins. Co. (N. Y. S. C. 1895), 65 N. Y. St. Rep. 493; Vatton v. National L. Fund Assn., 40 N. Y. 21; 20 N. Y. 32; 22 Barb. (N. Y.) 9; 4 Abb. Dec. (N. Y.) 437; 17 Abb. Pr. (N. Y.) 268; Rawes v. American L. Ins. Co., 27 N. Y. 282; 36 Barb. (N. Y.) 357; St. John v. American Mut. L. Ins. Co., 13 N. Y. 31; 64 Am. Dec. 529; 2 Duer (N. Y.), 419; Hogle v. Guardian L. Ins. Co., 6 Robt. (N. Y.) 567; 4 Abb. N. S. (N. Y.) 347; Cannon v. Mutual L. Ins. Co., 29 Hun (N. Y.), 470.

[202] Blackburn v. St. Paul F. & M. Ins. Co., 116 N. C. 821; 21 S. E. Rep. 922.

[203] Eckel v. Renner, 41 Ohio St. 232.

[204] Clark v. Allen, 11 R. I. 439.

[205] Fairchild v. Northeast M. L. Ins. Co., 51 Vt. 613.

[206] Bursinger v. Bank of Watertown, 67 Wis. 76. See Archibald v. Mutual Ins. Co., 38 Wis. 542.

[207] New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591; Robinson v. United States Mut. Acc. Assn. (U. S. C. C. E. D., Mo., 1895), 68 Fed. Rep. 825; Ætna L. Ins. Co. v. France, 94 U. S. (4 Otto) 561; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. (4 Otto) 457; Lamont v. Hotel News etc. Assn., 30 Fed. Rep. 817; Langdon v. Mutual L. Ins. Co., 14 Fed. Rep. 272. See Connecticut Mut. L. v. Fisher, 30 Fed. Rep. 662. See Kentucky L. & A. Ins. Co. v. Hamilton, 11 U. S. C. C. A. 42; 43 Fed. Rep. 93; 24 Ins. L. J. 43; contra, Warnock v. Davis.

has been declared void in Alabama,[208] Kansas,[209] Kentucky,[210] Pennsylvania,[211] and in Texas.[212]

§ 920. **Insurable Interest—Policy Payable "as His Interest may Appear."**—One need not have an insurable interest under a policy payable "as his interest may appear." [213]

§ 921. **Interest of Donor or Contributor.**—A turnpike company which voluntarily contributes to the erection of a bridge to be used by its customers and the general public has no insurable interest in the bridge, nor can the county intervene, in case of loss by fire, to claim the insurance effected by the company; nor is either the company or the county entitled to claim compensation, as part of the insurance, for loss of tolls while the bridge is rebuilding.[214]

§ 922. **Interest of Bailor and Bailee—Generally.**—Where one had effected insurance on a certain number of bushels of wheat in a warehouse, and held the warehouseman's receipt therefor, and there was when the loss occurred sufficient wheat to correspond with the quantity insured and with the description in the receipt, it was held that the plaintiff could

104 U. S. 775; Cammack v. Lewis, 15 Wall. (U. S.) 643; Swick v. Home L. Ins. Co., 2 Dill. (C. C.) 160.

[208] Helmstago's Admr. v. Miller, 76 Ala. 183; Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329; 1 S. Rep. 561; Stoelker v. Thornton (Ala.), 6 S. Rep. 680.

[209] Missouri Valley L. Ins. Co. v. McCrune, 36 Kan. 146; 12 Pac. Rep. 517; Missouri Valley L. Ins. Co. v. Sturgis, 18 Kan. 93; 26 Am. Rep. 761.

[210] Basye v. Adams, 81 Ky. 368.

[211] Hoffman v. Hoke (Pa.), 15 Atl. Rep. 437; Carpenter v. United States L. Ins. Co., 161 Pa. St. 9; 28 Atl. Rep. 943; 23 L. R. Annot. 571 (case of absolute assignment); Keystone Mut. B. Assn. v. Norris, 115 Pa. St. 446; Ruth v. Katterman, 112 Pa. St. 251. See Stambaugh v. Blake (Pa.), 15 Atl. Rep. 705; Dorney v. Hoffer, 110 Pa. St. 109; contra, Cunningham v. Smith, 70 Pa. St. 450.

[212] Schonfield v. Turner, 75 Tex. 324; 12 S. W. Rep. 626; Price v. Knights of Honor, 68 Tex. 361.

[213] Donaldson v. Sun Mut. Ins. Co. (Tenn. 1895), 32 S. W. Rep. 251.

[214] Farmers' etc. Co. v. New Holland etc. Co., 122 Pa. St. 37; 15 Atl. Rep. 563. As to insurable interest of donee or donation inter vivos, see 1 Phillips on Insurance, 3d ed., 117, sec. 176.

recover, although the warehouseman had fraudulently issued receipts for wheat he did not have.[215] So a bailee has an insurable interest in goods bailed, he being liable by law, custom, or by contract for certain risks to which they may be subjected.[216] And a bailee, although not responsible for risks which may attach to the goods, may insure in his own name "on account of or for whom it may concern," and the act may be ratified by the owner.[217] A bailor who has an insurable interest in the property can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee; and the case is not varied or affected by a clause in receipts given by him "not responsible for any loss by fire." [218] But until the owner of the goods insured by the bailee for service (to be manufactured) as "held in trust," etc., ratifies, as principal, such insurance by the bailee as his agent, he acquires no interest under the policy, and where he has made no ratification of the insurance, the bailee is at liberty to cancel it at any time.[219] A bailee has an insurable interest where he has given a bond for an attachment,[220] and a depositor has an equitable interest in the policy, as against creditors of the depositary, in a case where the latter has, under an agreement with the former, insured the deposited goods in his own name for the depositor's benefit.[221]

§ **923. Pledgor and Pledgee—Pawnbroker.**—One who pledges his property and remains in possession thereof may insure it to the full value, where he would still be liable on the debt in case of loss, and the measure of his loss is the value of the property borrowed which would have reduced his indebted-

[215] Clark v. Western Assur. Co., 25 U. C. Q. B. 209.

[216] See Ætna Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Crowley v. Cohen, 3 Barn. & Adol. 478; Franklin Ins. Co. v. Coates, 14 Md. 285; Eastern Railroad v. Relief Ins. Co., 98 Mass. 420; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77.

[217] Fire Ins. Assn. v. Merchants' etc. Trans. Co., 66 Md. 339.

[218] California Ins. Co. v. Union Compress Co., 133 U. S. 387; 33 Fed. Rep. 730; 7 R. R. & Corp. L. J. 363; 19 Ins. L. J. 385; 10 Supp. Ct. Rep. 365.

[219] Stillwell v. Staples, 19 N. Y. 401.

[220] Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 312.

[221] Providence County Bank v. Benson, 24 Pick. (Mass.) 204.

ness.[222] And a pledgee or pawnbroker, with whom goods are pledged, or who holds the same as security for a debt or advances made, has an insurable interest therein, even to the full value thereof.[223]

§ **924. Innkeepers.**—In so far as an innkeeper has lien upon goods or property of his guests, or is liable to others for their custody and safekeeping, or will receive a benefit from the continued existence of such goods or property, he would, on analogous principles with those which govern in other cases, have an insurable interest in such property.[224]

§ **925. Carriers.**—A common carrier who is liable by law, custom, or contract if only for his own negligence for goods held by him or under his care, or who has a lien thereon, has an insurable interest therein, and may insure them to their full value, and the policy need not specify the nature of his interest.[225] He may also insure himself against the negligence of his own servants.[226] So common carriers have an insurable interest in the goods, whether they carry them by their own vessels or transport them in a vessel chartered and not owned by them.[227] And where a company received cotton to press, and issued receipts therefor, which were exchanged with a railroad company for its bills of lading for the transportation of the cotton, agreeing to deliver it at an address specified in the

[222] Nussbaum v. Northern Ins. Co. etc., 37 Fed. Rep. 524; 1 L. Rep. Annot. 704.

[223] Waring v. Indemnity F. Ins. Co., 45 N. Y. 607; Wells v. Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

[224] See Eastern Railroad v. Relief Ins. Co., 98 Mass. 420.

[225] Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S. 312. 323, per the court; California Ins. Co. v. Union Compress Co., 133 U. S. 387; Savage v. Corn Exchange etc. Ins. Co., 36 N. Y. 655; 4 Bosw. (N. Y.) 1; The Sidney, 23 Fed. Rep. 88; Crowley v. Cohen, 3 Barn. & Adol. 478; Cal. Civ. Code, sec. 2548; Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136; Ætna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 245; Eastern R. R. Co. v. Relief F. Ins. Co., 98 Mass. 420; Hough v. People's Ins. Co., 36 Md. 398. As to railroad companies, see sec. 898, herein.

[226] California Ins. Co. v. Union Compress Co., 133 U. S. 387; 10 Sup. Ct. Rep. 365; 7 R. R. & Corp. L. J. 363.

[227] Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595.

bill of lading, the railroad company has an insurable interest in the cotton, which may be covered by a policy issued to the former company.[228] The provision in such bills of lading, that they shall not be liable for loss by fire, does not relieve them from liability for loss arising from their own negligence, or that of their servants, and against such latter loss they may insure themselves;[229] and the interest of common carriers on a canal in property is covered by a policy on "goods and merchandise."[230] So in another case the insurance, being against loss or damage by fire, stipulated to cover merchandise, being such as might, therefore, be placed in depots to be named, for conveyance between certain points, and also to cover the risk thereon in cars. The policy further provided that goods "held in trust on a commission" should "be declared as such," otherwise not to be covered. It was held that the indemnity was confined to the loss or damage the company had sustained by the destruction or injury to such property by fire, and that, in the absence of evidence of ownership in the company of the merchandise, some loss or liability of the company by fire must be shown to warrant a recovery.[231] But it is also decided that a a recovery is not limited to the interest of the assured as carriers, but that the whole value of the goods in their warehouse and possession was covered, the insurers having received a premium on the full value; and this although the carriers were not liable to the owners of the insured property for its loss. The policy in this case contained a stipulation that goods "held in trust or on commission" should be insured as such, and described the property as "goods, their own and in trust as carriers."[232]

§ 926. Warehousemen—Wharfingers.—Where warehousemen have contracted to indemnify the owners of goods stored with them, they have an insurable interest therein, and a pol-

[228] California Ins. Co. v. Union Compress Co., 133 U. S. 387; 7 R. R. & Corp. L. J. 363; 19 Ins. L. J. 385; 10 Sup. Ct. Rep. 365.

[229] California Ins. Co. v. Union Compress Co., 133 U. S. 387; 10 S. C. Rep. 365.

[230] Crowley v. Cohen, 3 Barn. & Adol. 478.

[231] Duncan v. Sun Mut. Ins. Co., 12 La. Ann. 486.

[232] London & Northwestern Ry. Co. v. Glyn, 28 L. J. Q. B. 188; El & E. 652.

icy on cotton in the warehouse of the insured will cover not only that owned by him, but also that which he has in his possession as warehouseman;[233] and it makes no difference that the policy is in the name of the warehouseman, although the fact that the ownership was in another was not disclosed to the company, the policy covering goods, "their own, or held by them in trust or on commission, or on joint account with others," for the warehouseman has an insurable interest in such case, and may recover to the full value of the goods.[234] But one who effects insurance covering his own goods and goods stored with him, and collects the insurance money, is liable to the owner of such stored goods for his share, although he did not request or know of the insurance, and did not ratify it before the payment of the loss.[235] So a commission merchant who is engaged in buying and selling grain, and owns and operates an elevator in connection therewith, and receives wheat which is stored, although at the depositor's risk, may insure the same at its full value, even though it loses its identity by being mixed with the former's grain;[236] and a compress company which receives cotton to press has an insurable interest therein.[237] So a compress company is liable for its neglect to insure cotton in its possession, where it has contracted with a common carrier to compress all cotton which the latter shall deliver to it, or which it receives from the owners as agent of the carrier and to insure the same.[238] So wharfingers or warehousemen may insure goods, "corn and flour" held by them in that capacity, "in trust or on commission," by a policy in their own name, even though no obligation rests upon them to insure, and they have only a lien for cartage and warehouse rent, and in such a

[233] Pelzer Mfg. Co. v. Sun Fire Office etc., 36 S. C. 213; 15 S. E. Rep. 562.

[234] Pelzer Mfg. Co. v. St. Paul F. etc. Co., 41 Fed. Rep. 271.

[235] Snow v. Carr, 61 Ala. 363; 32 Am. Rep. 3.

[236] Baxter v. Hartford F. Ins. Co., 11 Biss (C. C.) 306; 14 Fed. Rep. 106; 12 Fed. Rep. 481. See Clark v. Western Assur. Co., 25 U. C. Q. B. 209.

[237] See California Ins. Co. v. Union Compress Co., 133 U. S. 387; 19 Ins. L. J. 385; 10 Sup. Ct. Rep. 365; 7 R. R. & Corp. L. J. 363.

[238] Deming v. Merchants' Cotton Press and Storage Co., 90 Tenn. 306; 17 S. W. Rep. 89; 13 L. R. Annot. 518.

case they may recover the entire value of the goods so far as covered by the policy.[239] Not only the interest of the warehousemen is covered, but the merchandise itself, where the insurance is under a policy on goods, "their own or held by them in trust," or in which they have an interest or liability.[240]

§ **927. Commission Merchants—Consignees.**—A person having goods or property in his possession as consignee, or on commission, may insure them in his own name, and in the event of loss, recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner,[241] such insurance only covering his insurable interest in such goods or property.[242] Thus, an insurance may be effected by a nominal partnership in its name on grain held on commission only, the policy so describing the risk.[243] So an agricultural implement dealer may insure in his own name a stock of goods in his possession, owned partly by him, being held for sale on commission, and, in the absence of fraud, he is entitled to recover the full value allowed by the terms of the policy.[244]

§ **928. Merchant Furnishing Dealer with Stock.**—If a merchant furnishes another with a stock of goods, depending for his payment upon the latter's success in business, he has an insurable interest in such stock.[245]

§ **929. Agents.**—An agent's, consignee's, or factor's right to insure his own interest is a distinct proposition from that of effecting insurance for his principal, and we have al-

[239] Waters v. Monarch Assur. Co., 5 El. & Bl. 870; 25 L. J. Q. B. 102.

[240] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527.

[241] Hough v. People's F. Ins. Co., 26 Md. 398.

[242] Parks v. General Interest Assur. Co., 5 Pick. (Mass.) 34.

[243] Phœnix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504. See, also, cases in last section.

[244] St. Paul F. & M. Ins. Co. v. Kelley, 43 Kan. 741; 23 Pac. Rep. 1046. See cases under preceding section.

[245] Roos v. Merchants' Mut. Ins. Co., 27 La. Ann. 409.

ready considered this question to some extent.[246] Thus, an agent who holds a lien by reason of advancement, or otherwise, made on the goods has an insurable interest.[247] So the officers and crew have an insurable interest in captured vessels before condemnation;[248] and a general agent, upon the consignee's refusal to receive the goods, may insure them in his own right where he has accepted bills on account of them.[249]

§ **930. Consignor.**—The right of the consignor, who is the actual owner, to insure his goods or property is undoubted.[250]

§ **931. Consignees and Factors—Supercargo.**[251]—There are different kinds or sorts of consignees; some have a mere naked right to take possession; others are intrusted with the property, with the right and power to sell, manage, and dispose of the same, subject only to the consignor's rights.[252] A factor is also called a commission merchant or consignee,[253] and sometimes he is called a supercargo.[254] In case of a factor or consignee, expected commissions constitute an insurable interest eo nomine; so, also, in cases where goods are consigned for sale, and they have a lien for advances, they have an insurable interest, and this extends to the amount of the advances made; and they may insure to the full value and in their own name, holding the balance as trustees for the consignors.[255] And a consignee

[246] See chap. xxiv. herein.

[247] Russell v. Union Ins. Co., 1 Wash. (C. C.) 409.

[248] Le Cras v. Hughes, 3 Doug. 81. See sec. 629, herein.

[249] Wolff v. Horncastle, 1 Bos. & P. 316.

[250] Hebbert v. Carter, 1 Term Rep. 744.

[251] See secs. 623-25, herein.

[252] Lucena v. Crawford, 2 Bos. & P. N. R. 324, per Lord Eldon.

[253] Graham v. Duckwell, 8 Bush (Ky.), 12. See Perkins v. State, 50 Ala. 154.

[254] See secs. 623, 624, herein.

[255] Putnam v. Mercantile Ins. Co., 5 Met. (Mass.) 386; Russell v. Union Ins. Co., 1 Wash. (C. C.) 409; 4 Dall. (C. C.) 421; Carruthers v. Sheddon, 6 Taunt. 14; Law v. Goddart, 12 Mass. 112; Siter v. Moss. 13 Pa. St. 220; Seamans v. Loring, 1 Mason (C. C.), 127, per Story, J.; Parks v. General Int. Assur. Co., 7 Pick. (Mass.) 34; Conway v. Gray, 10 East, 536; Randolph v. Ware, 3 Cranch (U. S.), 503; Flint v. Le Mesurier, Park on Insurance, 8th ed., 563; De Forest v. Fulton, 1

may have an insurable interest where he, having the bills of lading, has accepted bills on account of the consignment, the debt being such as would give a lien upon the goods.[256] So a commission merchant to whom the cargo of a vessel is consigned for sale has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage;[257] but the goods must have been ready and contracted to be put on board or actually on board, at the time of loss.[258] Where one, in expectation of goods to be shipped on his own account in a certain vessel, effects insurance and no such goods are shipped, but other goods are consigned to him in the same vessel on account of the shipper, whose creditor and general agent he is, but of this shipment and consignment he had no notice when he effected the policy, it was held that he could not recover a partial loss on such goods, although he was entitled to have his premium returned.[259] And it is a customary practice for commission merchants, to whom consignments have been made by several consignors, to cover all consignments by a policy in their own names.[260] And where goods are consigned to a person to be shipped to a certain place at his own expense, and there sold by him, the profits to be divided equally between him and the assignor, and, in case of no sale, to be returned to the latter free of all expense, in such case the consignee has an insurable interest in the goods, and may insure to their full value.[261] So where a foreign merchant consigned goods to a factor in England, it was held that the latter had an insurable

Hall (N. Y.), 94; Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670. See Aldrich v. Equitable Ins. Co., 1 Wood. & M. (C. C.) 272.

[256] Wolff v. Horncastle, 1 Bos. & P. 316. See, also, Robertson v. Hamilton, 14 East, 522.

[257] Putnam v. Mercantile M. Ins. Co., 5 Met. (Mass.) 386; Barclay v. Cousins, 2 East, 544; French v. Hope Ins. Co., 16 Pick. (Mass.) 597; King v. Glover, 2 Bos. & P. N. R. 206; Wells v. Philadelphia Ins. Co. 9 Serg. & R. (Pa.) 103.

[258] 1 Arnould on Marine Insurance, Perkins' ed., 210, *206, sec. 93; citing Knox v. Wood, 1 Camp. 541. And see case as reported in 2 Park on Insurance, 504.

[259] Tappan v. Atkinson, 2 Mass. 365.

[260] See Millaudon v. Atlantic Ins. Co., 8 La. 557.

[261] Sturm v. Atlantic Mut. Ins. Co., 38 N. Y. Sup. Ct. 281; 6 Jones & S. (N. Y.) 281.

interest therein, to the extent of a general balance due him from such merchant.[262] So where goods are shipped on the account and risk of the consignor, to be sold for his benefit, and the goods, at the termination of the voyage, have come into the possession of the consignee, he may insure.[263] And where the consignees had made advances, and also held shares as partners in the cargo insured, it was held that they had an insurable interest to the full value, and were entitled to recover the whole loss.[264] It is also held that a consignee, with general powers to manage and sell the property has an insurable interest in the goods in his possession as consignee, and may insure in his own name, and aver the interest in himself in a suit in his own name, although by general usage, as a general rule, in marine insurances, a consignee for sale does not insure, and is not expected to insure, against maritime risks, and on a voyage of importation without an order from the principal, yet it is said that if a consignee who has merely notice of a consignment should, upon receipt of the bills of lading, effect insurance bona fide "upon the goods consigned to him for the voyage of importation, I am not prepared to say that the contract would be void, or that the charge of the premium could be rejected by the consignor." [265] Such a rule, as applied to the facts of the case, is, however, denied by Mr. Duer.[266] Mr. Parsons says: "We cannot doubt, however, that one may have an insurable interest in goods before they come into his possession, and without making any advance or incurring any expenses about them whatever; for, as we have said, a consignee has an insurable interest in goods consigned to him

[262] Godin v. London Assur. Co., 1 Burr. 439; 1 W. Black. 103. See sec. 625, herein.

[263] Sargent v. Morris, 3 Barn. & A. 277; The Mary and Susan, 1 Wheat. (U. S.) 25; The Venus, 8 Cranch (U. S.), 253.

[264] Carruthers v. Sheddon, 6 Taunt. 14.

[265] De Forest v. Fulton Ins. Co., 1 Hall (Sup. Ct. N. Y.), 94, per Jones, C. J.; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; Story on Agency, sec. 111, n. 4; Lucena v. Crawford, 3 Bos. & P. 75; 2 New R. 269. See criticism of the above cases in 2 Duer on Marine Insurance, ed. 1845, 160, n. 2, 173. See sec. 625, herein.

[266] 2 Duer on Marine Insurance, ed. 1846, 109.

for sale as soon as the consignment is made." [267] Mr. Duer says: "It is, moreover, certain that a consignee, during the voyage of importation, is not a trustee, even in the most limited sense of the term. During this period he has no right of property, and no power of disposition or control. Where the goods are shipped on the account and risk of the consignor as is invariably the case where they are meant to be sold for his benefit, the entire property remains in him during the voyage. He is the true and sole owner, and the rights and duties of the consignee as a trustee only commence when the voyage has ended and the goods have been transferred into his own possession.[268] Hence, to assert the universal right of a consignee to insure the entire property on the voyage of importation is to assert that a valid insurance may be made to a person who has no title or interest, legal or equitable, and no authority, express or implied." [269] And Mr. Wood says: "An agent even, having no lien on goods for advances, commission, or otherwise, nor the possession, care, and custody of the same as carrier or bailee, or any liability to account for their loss by the perils insured against, has no insurable interest therein, although he is named as shipper and consignee on the bill of lading, and the same rule holds good as to consignees, carriers, factors, warehousemen, or bailees generally, unless they had, at the time of effecting the insurance, some interest therein, present or contingent, as a claim for freight advances, profits, or some pecuniary interest, or are liable to the owner for the safe-keeping of the property; an insurance effected by them in their own name is totally inoperative and void, even though intended for the ben-

[267] 1 Parsons on Marine Insurance, ed. 1868, 197; citing Putnam v. Mercantile Mar. Ins. Co., 5 Met. (Mass.) 386: De Forest v. The Fulton Fire Ins. Co., 1 Hall (Sup. Ct. Rep. N .Y.), 84.

[268] Citing Sargent v. Morris, 3 Barn. & A. 277; Ludlow v. Boune, 1 Johns. (N. Y.) 1; McIntire v. Boune, 1 Johns. (N. Y.) 229; The Venus, 8 Cranch (N. Y.), 253, 275; The Merrimack, 8 Cranch (N. Y.), 317, 327; The Francis, 8 Cranch (N. Y.), 359: The Mary and Susan, 1 Wheat. (U. S.) 25; The St. Jose Indiano, 1 Wheat. (U. S.) 208; Abbott on Shipping, Story's ed., 316, n.

[269] 2 Duer on Marine Insurance, ed. 1846, 110, 111, 160, et seq.; 1 Id., 426, 430.

efit of the real owner, unless ratified by him."[270] And it is held that a supercargo has an insurable interest in the cargo, where he has contracted with the owner for compensation for his services.[271]

§ **932. Trustees.**[272]—A trustee's interest in the trust estate is insurable as such when coupled with the present right to possession, or with the actual possession, but the mere expectation of a grant or trust is not insurable.[273] So a trustee, under a deed of trust in the nature of a mortgage, has a separate insurable interest in the property;[274] nor does the fact that the grantor in such deed conveys his interest affect the trustee's right to so insure.[275] But where trustees under a second mortgage of a railroad company, and who were in possession of and operating the road, procured, as "trustees of the convertible mortgage" of the company, a policy on certain of its property, it was held that the insurance did not cover advancements made by them as trustees which were unpaid when the policy was effected, and also at the time of loss, and for which they had

[270] 1 Wood on Fire Insurance, 2d ed., 664, 665; citing Seagraves v. Union M. Ins. Co., L. R. 1 Com. P. 305.

[271] Robinson v. New York Ins. Co., 2 Caines (N. Y.), 357.

[272] See sec. 627, herein.

[273] Ex parte Houghton v. Gribble, 17 Ves. Jr. 25. In Lucena v. Crawford, 3 Bos. & P. 75, it is said: "It is not necessary that an insurer should have a beneficial interest in the property insured; it is sufficient if he be clothed with the character of a trustee, an agent, or a consignee"; and again: "But granting the commissioners to be merely trustees for persons unknown, and for objects not precisely ascertained at the time when the insurance was effected, yet if they were trustees to any purpose, they acquired from that character sufficient interest in the trust property to insure. Trustees under the court of chancery, trustees for lunatics, trustees for infants, trustees for all who cannot act for themselves, certainly may insure": Crawford v. Hunter, 8 Term Rep. 13; Tidswell v. Angerstern, Peakes N. P. C. 204; Tyler v. Ætna Ins. Co., 12 Wend. (N. Y.) 507; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; White v. Hudson River Ins. Co., 15 How. Pr. (N. Y.) 288; 7 Id. 341.

[274] Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495; 4 How. (U. S.) 185; Honore v. Lamar F. Ins. Co., 51 Ill. 409; Dick v. Franklin F. Ins. Co., 81 Mo. 103; Suffolk Ins. Co. v. Boyden, 9 Allen (Mass.), 123; Graham v. Fremont Ins. Co., 2 Disn. (Ohio) 255.

[275] Dick v. Franklin F. Ins. Co., 81 Mo. 103.

obtained a decree adjudging such advances a lien upon the property of the road, to be paid out of its first earnings.[276] A trustee cannot refuse to pay over the proceeds of a life policy to the payee on the ground of want of insurable interest in the latter, where he has received them in trust for said payee, under an agreement so to do made with insured.[277]

§ **933. Cestui que Trust.**—A *cestui que trust* has an insurable interest in the trust property, and may insure for himself.[278]

§ **934. Assignee or Trustee of Insolvent.**—Assignees or trustees to whom an assignment of the estate of insolvent debtors may be made have an insurable interest in such estate; so an assignee in bankruptcy may insure.[279] An assignee may take out additional insurance where his insurable interest is not defeated by the fact that the policies assigned with the estate covered the value of the property.[280]

§ **935. Stockholders.**—There is some question whether a stockholder in a private corporation has an insurable interest in the corporate property. The weight of authority seems, however, to be that he has. And this is consistent with the rule which governs in other cases. An insurable interest does not necessarily imply property in the subject of insurance, nor is even a legal or equitable title necessary, nor need such interest amount to a right of property or possession. Whenever a legal connection can be shown to exist between injury to the thing insured and the loss to the party insuring, it is sufficient; so a qualified interest is an insurable interest. Again, a slight or contingent interest is sufficient when founded upon an actual

[276] Bishop v. Clay F. & M. Ins. Co., 45 Conn. 430. See opinions, however, of Carpenter, J., and Granger, J., who dissent.

[277] Hurd v. Doty, 86 Wis. 1; 56 N. E. Rep. 371; 21 L. R. Annot. 746.

[278] Gordon v. Massachusetts Ins. Co., 2 Pick. (Mass.) 249; Butler v. Standard F. Ins. Co., 4 U. C. App. 391; Hill v. Secretan, 1 Bos. & P. 315.

[279] Goulstone v. Royal Ins. Co., 1 Fost. & F. 276; Herkimer v. Rice, 27 N. Y. 163; Marks v. Hamilton, 9 Ex. 323, 21 L. J. Ex. 109.

[280] Sibley v. Prescott Ins. Co., 57 Mich. 14.

right to the thing, or upon a valid contract to it. So one may have an insurable interest in profits.[281] Stockholders in a corporation organized for pecuniary profit have certainly rights of a pecuniary nature, growing out of their connection as such with the company, and they might sustain a loss by the destruction of the corporate property more or less dependent upon various circumstances. They have a right to share in the dividends and in the final distribution of the corporate property, and it is the right to share in the profits which constitutes the inducement to become a stockholder. A destruction of, or injury to, such property might materially affect both the amount of dividends and the value of the stock; especially if the entire property representing the whole capital of the corporation were totally destroyed. Therefore, a stockholder has such an interest in the preservation of the corporate property, that he may, by an insurance, contract for indemnity to the extent of his interest for the actual loss which he might sustain by the injury or destruction of said property.[282] It was urged in one of the cases relied on in support of the proposition[283] that shares of stock in a corporation are choses in action, and consequently not to be considered an interest in the real property of the company, and on this point it was declared that such claim could be admitted without denying the shareholder's interest in the property of the corporation; that a mortgage was also a chose in action, but it was not doubted but that a mortgagee had an insurable interest in himself in the mortgaged premises, based upon the interest he has in the preservation of the same as a security for his debt, and that upon precisely the same principle a stockholder might contract for indemnity to the value of his stock; for he has also an interest in the preservation of the corporate property.[284] The case of Phillips v. Knox County Mutual Insurance

[281] See secs. 895-897, herein.

[282] This is in substance the opinions given in Riggs v. Commercial Ins. Co., 125 N. Y. 7; 25 N. E. Rep. 1058, per Andrews, J.; Warren v. Davenport F. Ins. Co., 31 Iowa, 464; 7 Am. Rep. 160, per Miller, J.; Seamen v. Enterprise F. & M. Ins. Co., 5 McCrary (C. C.), 558; 18 Fed. Rep. 250. See, also, Wilson v. Jones, L. R. 2 Ex. 139; Patterson v. Harris, 1 Best & S. 336.

[283] Warren v. Davenport F. Ins. Co., 31 Iowa, 464.

[284] Warren v. Davenport F. Ins. Co., 31 Iowa, 464, per Miller, J.

Company,[285] which is often cited as sustaining the proposition that a stockholder has no insurable interest in the corporate property, does not decide, nor does the principle upon which that case rests conflict with the rule above given. In that case, the charter of the insurance company, a mutual one, gave a lien on the insured property, including the land on which the buildings stood. It further stipulated that the true title of the insured should be stated in the application and policy. The building and land were the property of an incorporated company, and its stockholders insured the same as their individual property—that is, as owners—and the court rightly held that a stockholder could not, under the provisions of the insurer's charter, insure as his own individual property that of the corporation. This case is considered in the opinion of the court in the Iowa decision above mentioned, and held not in point on the question, the court [286] saying: "Under the charter of that company, a mortgagee even insuring the property as his own would likewise be defeated in a recovery; so the owner of a fee simple could not recover if the property was encumbered and the encumbrance not set forth in the policy, and of course the same result must follow where a stockholder insures corporate property as his own individual property." In a Pennsylvania case,[287] a company which was not incorporated erected a hotel upon land owned by the state. The interest of all the stockholders was transferred to creditors. One of the stockholders, who had furnished labor and materials in the erection of the building, was the principal creditor. Before said transfer he was in possession of the building, and continued in its possession, held control thereof subsequently thereto, and insured the same, and it was decided that he had not such an insurable interest therein as to warrant a recovery under the policy.[288]

§ **936. Sureties.**—Sureties on a distiller's bond, given under the internal revenue laws, who are also part owners of the whisky distilled and in store, have an insurable interest

[285] 20 Ohio. 174.
[286] Per Miller, J.
[287] Sweeny v. Franklin F. Ins. Co., 20 Pa. St. 337.
[288] See further Wilson v. Jones, L. R. 1 Ex. 193; 2 Id. 139.

in such property, not only as owners, but also by reason of the liability on the bond for the payment to the government of the tax due on the whisky.[289] And in case of a life risk, the surety on an official bond has an insurable interest in the life of the obligor, nor is his right to recover defeated by the fact that there has been no breach of the bond.[290]

§ **937. Receiptor for Goods Attached—Surety on Appeal.**—A receiptor, or any person who gives a bond or becomes security for goods attached, acquires thereby an insurable interest in the property, as where a steamboat is attached, and a party gives a bond for its delivery.[291] And where an appeal was taken by the captor from a decree of restitution, a surety for the payment of the value of the cargo restored has an insurable interest therein.[292]

§ **938. Indorser of Note.**—One who is liable as an indorser of a mortgage note has an insurable interest therein, as in case of a mortgagee who has assigned the mortgage and indorsed the note.[293] So where one to whom the goods insured were sold, and to whom the policy was assigned, sold them to another, taking his notes, indorsed by A, in part payment, under an agreement that upon sale of the property the proceeds should be paid to A, it was held that A had an insurable interest therein.[294]

§ **939. Holder of Note or Bill of Exchange—Drawee.** The holder of a bill of exchange drawn by the captain abroad to cover the ship's disbursements has, the bill being dishonored, an insurable interest therein which, being specifically described in the policy, entitles him to recover the full amount thereof

[289] Insurance Co. v. Thompson, 5 Otto (95 U. S.), 547.

[290] Scott v. Dickson, 108 Pa. St. 6; 56 Am. Rep. 192, two of the judges dissenting.

[291] Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311.

[292] Russell v. Union Ins. Co., 4 Dall. (C. C.) 421.

[293] Williams v. Roger Williams Ins. Co., 107 Mass. 377.

[294] Davis v. Home Ins. Co., 3 U. C. App. 269; reversing same case, 24 U. C. Q. B. 364.

for his benefit.[295] And a policy on "property" on board will cover current bank-bills carried or received for the purchase of cargo, where the policy is on time, and it was unknown at the time of the insurance what the "property" would cover.[296] And where the goods were consigned to certain parties, and a bill was drawn upon them for less than the value of the goods, and the complainant discounted the draft, and the consignees accepted it and insured the goods to an amount in excess of the draft, it was held that the consignees had a right to effect the insurance for their own benefit, and their complainant was not entitled to claim any of the money under the policy;[297] but the indorsee of bills drawn upon a contingency, such as to be payable if the ship arrives safely, otherwise not, has no insurable interest therein.[298]

§ **940. Indorser and Indorsee of Bill of Lading.**—By the indorsement of a bill of lading to a creditor taken by him as a security for his debt, the whole property passes prima facie from the time of the delivery, and is a satisfaction pro tanto for the debt. This general rule may, however, be varied by agreement between the parties, and if it appears from the evidence that the consignor did not intend to pass the whole property, but only the net proceeds, in case the goods should arrive, the indorser retains an insurable interest.[299] And where a creditor of the shipper effected insurance upon information from the shipper that certain goods were consigned to him, and he was also directed to insure the same, the shipper promising to send him the bills of lading, which he never did, but afterward indorsed them to another who had made advances, and at whose directions a policy was effected, the underwriters being informed of the prior insurance, it was held that the indorsement

[295] Tasker v. Scott, 6 Taunt. 234.

[296] Whiton v. Old Colony Ins. Co., 2 Met. (Mass.) 1. But see opinion of Shaw, C. J., where it is said that if it were a particular shipment of bank bills, there might be a question whether they should not be specifically described; and see Palmer v. Pratt, 2 Bing. 185.

[297] Bank of South Carolina v. Bicknell, 1 Cliff. (C. C.) 85.

[298] Palmer v. Pratt, 2 Bing. 185.

[299] Hibbert v. Carter, 1 Term Rep. 745.

of the bills of lading did not carry the interest insured under the prior policy, and that each had an insurable interest.[300]

§ **941. Interest of Insurer—Reinsurer.**—An insurer under the original policy has an insurable interest, which he may protect by a reinsurance. The liability as insurer under his contract with the original insured enables him to protect himself by a contract for indemnity against those risks to the extent for which he is liable.[301]

§ **942. Interest in Solvency of Insurer.**—There is no doubt but that the insured, should he desire, may insure the solvency of the underwriter, for he has an insurable interest therein; although, as Mr. Arnould says, such a practice, even though valid at the common law, does not seem to have been resorted to in England; for the reason, principally, that a double insurance effects substantially the same purpose.[302]

§ **943. Interest in Royalties.**—Royalties to be paid for the exclusive use of a patent will support an insurance.[303] In this case the policy covered royalties to be paid to a patentee upon oil under a contract of exclusive manfacture, and the premises were burned wherein the business was carried on, and the claim was made that it was a wager policy.

§ **944. Copartners—Joint Owners.**[304]—A partner has an insurable interest in the firm property, which will support an insurance separately for his own benefit.[305] So insurance ef-

[300] Godin v. London Assur. Co., 1 W. Black. 103; 1 Burr. 489.

[301] Manufacturers' F. & M. Ins. Co. v. Western Assur. Co., 145 Mass. 419; 5 New Eng. Rep. 501; New York Bowery F. Ins. Co. v. New York F. Ins. Co., 17 Wend. (N. Y.) 359; Yonkers etc. Ins. Co. v. Hoffman etc. Ins. Co., 6 Rob. (N. Y.) 316; Eastern R. R. Co. v. Relief F. Ins. Co., 98 Mass. 425.

[302] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 294, *290; art. 2, sec. 120. Examine Id., art. 3, sec. 121; 1 Id., Maclachlan's ed. 1887, 105. See, also, 1 Phillips on Insurance, 3d ed., 129, secs. 205, 206.

[303] National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535; affirming 34 Hun (N. Y.), 559; 13 N. E. Rep. 337, and note.

[304] See secs. 614-616, herein.

[305] Manhattan Ins. Co. v. Webster, 59 Pa. St. 227; Laurence v. Sebor, 2 Caines (N. Y.), 203; Dumas v. Jones, 4 Mass. 647; Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329.

fected in good faith, without fraud or misrepresentation, with intent to protect the insured, upon goods described as "his goods" in a particular store, there being no other goods on the premises, will protect the interest of the insured, who is in fact owner of them, although his copartner is interested in the application and profit of such goods.[306] A member of a partnership has an insurable interest in the stock of goods, the one-half interest in which he has purchased, and agreed to pay for by note out of the proceeds of the business, even though he has neglected to sign the note.[307] So one partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner. Such property is joint property, and each partner has an equitable interest therein;[308] and it is held that a general partner may insure and make proofs of loss in his own name without disclosing the fact that there is a special partner.[309] So a retiring partner has an insurable interest while any liability remains.[310] If a retiring partner, upon dissolution of the partnership, conveys to his copartner all his interest in the firm property, and thereafter dies, said copartner has no such interest at the time of his death in the life assured as will enable him to recover on the policy, even though said retiring partner during the existence of the partnership had insured his life for the benefit of himself and copartner or their administrators and assigns, and the premiums were paid out of the partnership assets.[311] An insurance apparently made for an individual may be shown to be for a firm,[312] and where the policy was issued to one of the copartners, in his name only, on a stock of goods, of which the members of the firm were joint owners, and the policy was so made upon the representations of the insurer's

[306] Irving v. Excelsior F. Ins. Co., 1 Bosw. (N. Y.) 507.

[307] Hanover F. Ins. Co. v. Schrader (Tex. 1895), 31 S. W. Rep. 1100.

[308] Converse v. Citizens' Mut. Ins. Co., 10 Cush. (Mass.) 37.

[309] Clement v. British American Assur. Co., 141 Mass. 298. But see Irving v. Excelsior Ins. Co., 1 Bosw. (N. Y.) 507.

[310] Phœnix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504.

[311] Cheeves v. Anders (Tex. 1894), 24 Ins. L. J. 160; 28 S. W. Rep. 274; reversing 25 S. W. Rep. 324.

[312] Lawrence v. Sebor, 2 Caines (N. Y.), 203. But see sec. 1091 herein.

agent, who told the insured he might insure the whole, it was held that only the undivided interest of the insuring partner was covered, as it did not appear that there was any intention to make the policy for the firm's benefit;[313] but it is otherwise where the partner insuring and the agent knew that the insurance was intended for the benefit of all the members, and they ratified the act.[314] But a surviving partner may recover the insurance under a policy to the firm, although the policy will not include goods purchased after the death of the other member.[315] Unless there be a prior authority or a subsequent ratification, coupled with the intent to insure for the benefit of all, or unless it be so expressed in the policy, a partner cannot insure the whole property in his own name;[316] but where the partner was the principal member, and his interest would cover all the firm's assets, and was the substantial owner of the property, and the policy was made to the member individually, a recovery was adjudged,[317] although it is said that, in an action on a special contract under an insurance of an individual interest, evidence would be inadmissible of a copartnership interest nor vice versa.[318] Where two of several plaintiffs, in an action on a policy of insurance on a vessel, were owners of the vessel, and all were in copartnership and joint owners of the cargo, it was held that a sufficient interest in the plaintiffs was shown to enable them to sustain the action.[319]

§ 945. Partner—Life Risk.—Since a person who has advanced money has a title to the performance of the obligation arising therefrom, which the happening of the contingency insured against might wholly or partially defeat, and since one

[313] Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202. See Pitney v. Glen's Falls Ins. Co., 61 Barb. (N. Y.) 335.

[314] Manhattan Ins. Co. v. Webster, 60 Pa. St. 227.

[315] Wood v. Rutland Mut. F. Ins. Co., 31 Vt. 552.

[316] Murray v. Columbia Ins. Co., 11 Johns. (N. Y.) 312; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202, and cases immediately preceding; contra, Millaudon v. Atlantic Ins. Co., 8 La. 557.

[317] Irving v. Excelsior Ins. Co., 1 Bosw. (N. Y.) 507.

[318] Graves v. Boston M. Ins. Co., 2 Cranch (U. S.), 215, per Marshall, J.

[319] Bulkley v. Derby Fishing Co., 1 Conn. 571.

may have an insurable interest in another's life or health, where death or sickness would destroy or delay the performance of some obligation respecting property or services,[320] therefore a partner advancing his partner's share of the capital,[321] or one who has advanced money to aid a mining enterprise, and who procures one of the members of the association to represent him and work in the mines as his substitute, has an insurable interest in the latter's life.[322] And where partners advance capital against another partner's skill, they have an insurable interest in the latter's life.[323] And on analogous principles if a father agrees to relinquish his right to a minor son's earnings in order to enable him to enter into a trading expedition, he acquires thereby an interest to a share of its benefits and advantages, which constitutes a sufficient insurable interest to support a policy on the son's life. It also appeared in this case that the father furnished the son with an outfit.[324]

[320] See sec. 888, herein.

[321] Connecticut Mut. L. Ins. Co. v. Luchs, 108 U. S. 498. In this case Mr. Justice Field, in delivering the opinion, said: "The second question presented for our determination is whether Luchs had an insurable interest in the life of Dillenberg. Upon this we have no doubt. Dillenberg was his partner, and had not paid his promised proportion of the capital of the concern. At the time the policy was applied for he was still in default, and although it might have turned out that the actual amount due upon a settlement of accounts was less than the promised proportion, it was not a matter definitely ascertained at the time. Besides what was due to him Luchs was interested in having Dillenberg continue in the partnership. He had such an interest, therefore, as took from the policy anything of a wagering character."

[322] Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. (4 Zab.) 576; citing case under next note. The court said: "But if it be admitted that an interest in the life of Van Middlesworth on the part of Johnson was necessary to be shown, I think it satisfactorily appeared that he had such an interest. It is clear that the policy was entered into not as a cover for a wager, but for the bona fide purpose of securing Johnson against what he and the company regarded as a danger of real pecuniary loss; the interest required need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life."

[323] Valton v. National L. F. Assur. Co., 20 N. Y. 32; 22 Barb. (N. Y.) 9; s. c. Angell on Insurance, 326, note.

[324] Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.), 396.

§ 946. Part Owner.[325]—A part owner may insure his individual interest, nor is it necessary to specify the nature of the same. It is sufficient that the interest extends to the amount in question.[326] So a part owner of a ship, who at the request of the other part owners has made advances and disbursements for the expenses of a joint venture, has an insurable interest to that extent for the purpose of indemnifying himself.[327] In another case A agreed to sell to B, both part owners in a vessel, his share for a certain sum, to secure the payment of which B agreed to give a bill of sale for his own share. Insurance was effected by A on freight, after which B's interest was sold by the sheriff. A loss subsequently occurred, and it was held, in the absence of evidence that B had fulfilled his agreement, that A still retained an insurable interest.[328] So one owning one-half and hiring the other half of a vessel, with a covenant to pay a fixed sum, the value of half the vessel, in case of loss, may procure insurance on the whole vessel as his property.[329]

§ 947. General Creditors.—A creditor to receive the proceeds of goods consigned has an insurable interest therein,[330] and one who has sold a stock of goods to another may have an insurable interest therein as creditor, where his pay is to depend by agreement upon the sales thereof.[331] And where a woman, being indebted to the insured, agreed that the debt should be a lien upon her lands, and she subsequently married him, it was held that he had a valid insurable interest in her property.[332]

§ 948. Simple Contract Creditor in Estate of Deceased Debtor.—A simple contract creditor has an insur-

[325] See sec. 615, ante.

[326] Lawrence v. Van Horne, 1 Caines (N. Y.), 276; Oliver v. Greene, 3 Mass. 133; Garral v. Hanna, 5 Har. & J. (Md.) 412; Turner v. Burrows, 8 Wend. (N. Y.) 145; affirming 5 Wend. (N. Y.) 541.

[327] International Mar. Ins. Co. v. Winsmore (Pa.), 23 Week. Not. Cas. 204.

[328] Williams v. Insurance Co. etc., 1 Hill (N. Y.), 345.

[329] Oliver v. Greene, 3 Mass. 133.

[330] Hill v. Secretan, 1 Bos. & P. 315; Aldrich v. Equitable Safety Ins. Co., 1 Wood & M. (C. C.) 272. And see sec. 937 herein.

[331] Roos v. Merchants' Mut. Ins. Co., 27 La. Ann. 409.

[332] Rohrbach v. Ætna Ins. Co., 1 N. Y. S. C. 339.

able interest in specific property of the estate of deceased debtor where said estate may be subjected to proceedings in rem for the payment of debts, it being insufficient to satisfy the debts.[333] In this case the court, per Coleman, J., says: "The next proposition involves a question new in this state: Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor, which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation our conclusion is, that he has an interest, which may be insured. We concede and affirm that a simple contract debtor, without a lien either statutory or contract, without a jus in re or jus ad rem, owning a mere personal claim against his debtor, has not an interest in the property of his debtor. Such contracts are void, as being against public policy. We do not think the principle applies, after the death of the debtor, as to property liable for the debt, and which, if destroyed, will result in the loss of the debt. The real estate, as well as the personal property, of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable in personam. The proceedings to reach the property of the estate of the deceased debtor are in rem. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. . . . . The relation of debtor and creditor invests the creditor with an insurable interest in the life of his debtor to the extent of his debt.[334] It would seem, upon like principles, that when the property becomes directly subject to proceedings in rem for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly, if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings in rem against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and neces-

[333] Creed v. Sun Fire Office, 101 Ala. 522; 14 S. Rep. 323.

[334] Alexander v. Sanders, 93 Ala. 345; 9 S. Rep. 388; 11 Am. & Eng. Ency. of Law, 319.

sarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in case of a mortgagee, nor such a lien as the statute may confer on an attaching or execution creditor, but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. . . . . Other reasons might be given, but we are of opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate which may by law be subjected to proceedings in rem to the payment of the debts. The recovery cannot exceed the amount of the insurable interest." [335] It was also held in this case that a creditor has an interest in a deceased debtor's estate, although subject to the widow's dower and homestead rights.[336]

§ **949. Creditors as Assignees.**—A creditor of an assured may lawfully become the owner of such insurance to an extent requisite to protect him from ultimate loss of his demand.[337] So a creditor to whom has been assigned a mortgage with other securities to more than twice the amount of his debt has a certain and definite interest in the mortgaged property, susceptible of being affected by loss of fire, and therefore insurable.[338] And where a supercargo assigns his commissions, in case of his death during the voyage, to a creditor for the payment of a debt, the assignee's interest in the voyage is insurable.[339]

§ **950. Creditor Attaching or Levying Execution.**—A creditor in whose behalf an attachment is made or an execution levied has an insurable interest in the property so attached or levied upon, notwithstanding any claim which they might have

[335] 11 Am. & Eng. Ency. of Law, 530.

[336] Creed v. Sun Fire Office, 101 Ala. 522; 14 S. Rep. 323.

[337] Schonfield v. Turner, 7 L. R. Annot. 189; 75 Tex. 324; 19 Ins. L. J. 238; 12 S. W. Rep. 626.

[338] Insurance Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541.

[339] Wills v. Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

for loss against the officer making such attachment or levy, for the law does not require them to pursue the latter remedy which is purely personal, but permits them to look to the property itself.[340] But a policy taken out by a debtor on his property, at his own expense, is a policy on his own interest, and not on that of an attaching creditor.[341]

§ 951. Attaching Creditor must Insure his Interest.—Although an attaching creditor has an insurable interest in property attached, yet he must insure such interest, and cannot avail himself of the debtor's insurance against sureties by assignment of the debtor and a mortgagee, even though an excess of money over their claims be in the sureties' hands; for there is no privity of contract or estate between such creditor and them, for the assignees in such case hold by a new and original contract.[342]

§ 952. Judgment Creditor.—It is held in Pennsylvania that inasmuch as a judgment made there is a general and not a specific lien, a judgment creditor has no insurable interest in the specific property of his debtor.[343] Again, in a New York case the real estate of the debtor was sold under the judgment, and bid in by the creditor, and it was declared that he was entitled to the insurance money where the loss occurred after the sale, but otherwise the debtor would have been entitled to the amount, as he would also have been had he redeemed the property.[344] But in a federal case it is held that a judgment creditor has an insurable interest in the property of his debtor; but that he cannot recover from the insurer, upon an injury thereto, as for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied.[345] And in another case in New

[340] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132, per Story, J.; Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. (4 Hand) 309.

[341] Donnell v. Donnell, 86 Me. 518; 30 Atl. Rep. 67.

[342] Donnell v. Donnell. 86 Me. 518; 30 Atl. Rep. 67; 43 N. Y. 389; Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118.

[343] Grevemeyer v. Southern Mut. F. Ins. Co., 62 Pa. St. 340; 1 Am. Rep. 420.

[344] Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118.

[345] Spare v. Home Mut. Ins. Co., 8 Saw. 618; 15 Fed. Rep. 707.

York it was declared that such creditor has an insurable interest where the judgment constituted a lien upon the property.[346]

§ **953. Creditor in Life of Debtor.**—It is well settled that a creditor has an insurable interest in the life of his debtor,[347] even though the debtor be an infant;[348] and the policy may be effected by the creditor even without the debtor's consent,[349] or without an agreement with him or agency for him,[350] and such interest continues, although the statute of limitations would have barred an action on the debt if pleaded before the debtor's death.[351] So an indebtedness on a promissory note barred by the statute of limitations constitutes an insurable interest,[352] but if the note be given for a debt which the law declares void, such as a gambling debt, it will not give an insurable interest.[353] So advancements to another to start him in business, when repayment is to be made out of the profits, give an insurable interest.[354] So a creditor of a firm has an insurable interest in the life of one of the partners, even though the estate of both partners be solvent;[355] and one who has advanced money to further a mining enterprise of which he is a member, and subsequently assigns all his right, title, and inter-

[346] Rohrback v. Germania F. Ins. Co., 62 N. Y. 117.

[347] Rawls v. American M. L. Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180; Succession of Hearing, 26 La. Ann. 326; Fitzgerald v. Hartford L. & Ann. Ins. Co., 56 Conn. 116; 13 Atl. Rep. 673; American etc. Ins. Co. v. Robertshaw, 26 Pa. St. 189; Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. (4 Zab.) 576; Godsall v. Boldero, 9 East, 72; Parks v. Connecticut Ins. Co., 26 Mo. App. 511; Hoyt v. New York L. Ins. Co., 3 Bosw. (N. Y.) 440; Deering's Annot. Civ. Code, Cal., sec. 2763.

[348] Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

[349] Succession of Hearing, 26 La. Ann. 32. See Anderson v. Edie, cited in Park on Insurance, 432.

[350] Ferguson v. Massachusetts Mut. L. Ins. Co., 102 N. Y. 647; 32 Hun (N. Y.), 306.

[351] Rawls v. American M. L. Ins. Co., 27 N. Y. 282; 36 Barb. (N. Y.) 357; 84 Am. Dec. 280.

[352] Mowry v. Home Life Ins. Co., 9 R. I. 346.

[353] Divyder v. Edie, cited in 2 Park on Insurance, 7th ed., 639.

[354] Bevin v. Connecticut Ins. Co., 23 Conn. 244.

[355] Morrell v. Trenton etc. Ins. Co., 10 Cush. (Mass.) 282; 57 Am. Dec. 92.

est therein, with all his right to the money advanced, to another, he has an insurable interest in that other's life.[356] It is not, however, essential to the validity of a policy of life insurance issued to one person on the life of another that the person obtaining such policy be a creditor of the one whose life is insured.[357]

§ 954. Same Subject—Wager Policy—Amount Recoverable. — A creditor is sometimes made a beneficiary, and is bound by contract to pay the premiums.[358] Sometimes the insurance is taken out for the use and benefit of the creditor in a certain amount, and for the use and benefit of the life insured in an additional sum.[359] Again, the creditor may become the absolute assignee of the original policy,[360] or the assignment may be made merely as a collateral;[361] or the insurance may be made for the debt of a sum in excess thereof, and the balance to inure for the benefit of the debtor's family or representatives;[362] or the debtor may pay the premiums, and the policy be issued under circumstances which evidence a mere security for the debt.[363] These considerations are important upon the questions of the right of the creditor or the debtor's representative to the insurance money, and also upon the issue whether the policy is a wager, and the extent of the creditor's insurable interest. Thus, premiums paid are declared to be proper items to make up the insurable interest.[364] So money

[356] Hoyt v. New York L. Ins. Co., 3 Bosw. (N. Y.) 440.

[357] Hoyt v. New York etc. Ins. Co., 3 Bosw. (N. Y.) 440.

[358] So done in Amick v. Butler's Admr., 111 Ind. 578; 9 West. Rep. 842.

[359] So done in Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. 576.

[360] Lewy v. Gillard, 76 Tex. 400; 13 S. W. Rep. 304; Cawthorn v. Perry, 76 Tex. 383; 13 S. W. Rep. 268. See Crotty v. Union Mut. L. Ins. Co., 144 U. S. 621; 12 Sup. Ct. Rep. 749; 21 Ins. L. J. 645.

[361] Helmetage v. Miller, 76 Ala. 183; 52 Am. Rep. 316.

[362] American L. & H. v. Robertshaw, 2 Casey (26 Pa.), 189.

[363] See Courtenay v. Wright, 2 Giff. 337; Knox v. Turner, 39 L. J. Ch. 750; 5 L. R. Ch. 515; Morland v. Isaac, 20 Beav. 389.

[364] Grant v. Kline, 115 Pa. St. 618; 9 Atl. Rep. 150; Cawthorn v. Perry, 76 Tex. 383; 13 S. W. Rep. 268; Cooper v. Weaver's Admr. (Pa.), 11 Atl. Rep. 780; Lewy v. Gillard, 76 Tex. 400; 13 S. W. Rep. 304.

paid by the creditor for funeral expenses of the debtor, in accordance with an agreement made with the insured before his death, may be included.[365] The question, however, as to the amount the creditors are entitled to recover will be considered hereafter. If a creditor causes his debtor's life to be insured for a sum largely in excess of any loss that he can possibly suffer by the death of such person, the presumption is that the policy is a wager policy and invalid.[366] But a policy for three thousand dollars to protect a debt of one hundred dollars was held not a wager policy where the insured debtor was a man in good health, with an expectancy of life, according to the Carlisle tables, of twenty-six years, for which period the assessments and annual dues, with interest, would have amounted to a much larger sum than the amount of the policy, and it was held that a recovery could be had although the insured only lived a few years.[367]

§ 955. Owner of Goods Concealed from Creditors.—The owner of goods concealed from his creditors has an insurable interest therein.[368]

[365] Shaffer v. Spangler, 144 Pa. St. 223; 22 Atl. Rep. 865.

[366] Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180; Cooper v. Weaver's Admr. (Pa.), 11 Atl. Rep. 780; Mitchell v. Union Ins. Co., 48 Me. 104.

[367] Ulrich v. Reinoehl, 143 Pa. St. 238; 22 Atl. Rep. 862; 13 L. R. Annot. 433; Cooper v. Schaeffer, 20 Week. Not. Cas. 123; 11 Atl. Rep. 548; Shaffer v. Spangler, 144 Pa. St. 223; 22 Atl. Rep. 865; Grant v. Kline, 115 Pa. St. 618; 9 Atl. Rep. 150. In this case the debt as claimed by the administrators was two hundred and fourteen dollars; but, as claimed by the creditor, seven hundred and forty-three dollars. The debtor was sixty-years old, and in good health. It did not appear what was his expectation of life. The policy was declared not a wager, and the court said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest and the amount of premiums with interest thereon, during the expectancy of life as shown by the Carlisle tables. This view, however, has never yet been adopted by this court in any adjudicated case": See Cooper v. Weaver's Admr. (Pa.), 11 Atl. Rep. 780; Mitchell v. Union Ins. Co., 45 Me. 104. Creditor on life of his debtor, when declared a mere wager: 60 Am. Rep. 729.

[368] Goutstart v. Royal Ins. Co., 1 Fost. & F. 276. See Seron v. Wilmarth, 9 Allen (Mass.), 382.

§ **956. One Whose Goods are Levied on.**—One whose goods are levied on has an insurable interest, even though the officers have actual possession thereof.[369]

§ **957. Insolvent — Life Risk.**—Insolvency does not destroy the right of a man to insure his life for the benefit of his wife and children. The fact that he is insolvent at the time of assigning for their benefit a policy previously taken out is not proof of fraud.[370]

§ **958. Insolvent Debtor — Property.**—An insolvent debtor in possession of the goods has an insurable interest therein, notwithstanding they have vested in the provisional assignee.[371]

§ **959. Officer Serving Attachment or Making Levy.** Such officer in such case has an insurable interest in goods under his charge.[372] But where, by virtue of a warrant issued by the district court, a marshal seized a vessel and kept possession of her until determination of the case, it was held that he had no right to effect an insurance thereon at the expense of either party without their consent.[373] The court in this case said: "It is obvious from the statement already given that the equities of the case are strongly with the libelant, but I am of the opinion that the marshal had no authority to effect insurance on the vessel at the expense of either party without their consent. . . . . No case has been cited where it has been held that the sheriff is the agent of either party for the purpose of effecting insurance upon property attached and in his custody, and it is believed that no such case can be found. Want of authority is the foundation difficulty in the way of the libelant, and it is one which courts of justice cannot remove. Property seized under process from the admiralty is within the control of the

[369] Franklin Ins. Co. v. Findlay, 6 Whart. (Pa.) 483. See, also, Stephen v. Illinois Mut. Ins. Co., 43 Ill. 327; Cone v. Niagara F. Ins. Co., 60 N. Y. 619.

[370] McCutcheon's Appeal, 99 Pa. St. 133.

[371] Marks v. Hamilton, 16 Jur. 152; 7 Ex. 323; 21 L. J. Ex. 109.

[372] White v. Madison, 26 N. Y. 117.

[373] Burke v. Brig M. P. Rich, 1 Cliff. (C. C.) 509.

court, and in general, where there is danger of irreparable loss during the pendency of the suit, it is ordered to be sold and the proceeds placed in the registry of the court. That power is liberally exercised by the court, so that in most cases where there is any real embarrassment the marshal is relieved from extraordinary responsibility. Notwithstanding the seizure, the owner may insure if he sees fit, and if he elects not to do so, the marshal is only responsible for such reasonable care and diligence as is imposed on him by law."

§ **960. Lessor.**—A lessor may insure his interest in the buildings or other property leased,[374] and a lessor on ground rent who has entered for arrears, has an insurable interest.[375] So has a landlord in goods of his tenant which are liable to distress;[376] and the lessor may agree to keep the property insured for the lessee's benefit, there being an agreement to sell to him.[377] And in case of an option of the lessee to purchase, the owner may recover the loss, the option not having been exercised;[378] and even if the lessee has purchased, he cannot compel the lessor to turn over the surrender value of an existing policy,[379] for a policy taken out by the lessor does not inure to the lessee's benefit,[380] unless there be an express stipulation to that effect,[381] or the pledge be taken out for the lessee's benefit, and the option to purchase has been exercised.[382] It is held that a lease with the privilege of purchase by the lessee operates if the option be exercised as a change of title voiding the lessor's policy.[383] So a lessor in possession, under a claim of ownership under a title acquired by an act which constitutes a trespass against the lessees, may recover on an insurance procured thereon by him, and the insurers cannot dispute the lessor's in-

[374] Sherwood v. Harral, 39 Conn. 335; Ely v. Ely, 80 Ill. 532.
[375] Miltonberger v. Beacon, 9 Pa. St. 198.
[376] Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.
[377] Wilbour v. Trows etc. Co., 1 N. Y. St. Rep. 231.
[378] Hand v. Williamsburgh City F. Ins. Co., 57 N. Y. 41.
[379] Wilbour v. Trows etc. Co., 1 N. Y. St. Rep. 231.
[380] Leeds v. Cheetham, 1 Sim. 146; Ely v. Ely, 80 Ill. 532.
[381] Wilbour v. Trows etc. Co., 1 N. Y. St. Rep. 231.
[382] Gilbert v. Porter, 28 Ohio St. 276.
[383] Fire Assn. of Philadelphia v. Fleming (Tex. 1892), 19 S. W. Rep. 793.

terest by evidence of such fact;[384] and the lessors have an insurable interest in a building, the title to which has become vested in the lessors, after the expiration of the term, such building having been erected by the lessees under the conditions of the lease, which contained no reservation of a right of the lessees to remove it.[385] A covenant that the lessor insure runs with the land where the money realized is to be expended in rebuilding.[386] An agreement between the lessee and lessor that the amount of insurance and premium be shared between them in case of loss does not destroy the lessee's right to recover the full insurance.[387]

§ 961. Lessee—Sublessee.—A lessee has an insurable interest in the property leased.[388] So a leasehold interest in real estate is insurable, and a sublessee by parol may insure.[389] Thus, where a person has erected machinery and made improvements on the premises of which he is sublessee, he has an insurable interest in the property therein, which he retains connection therewith until the fire, although his lessor sells the premises to others who enter into possession.[390] So an option of the lessee to purchase is an insurable interest;[390a] but the lessee cannot, unless there be an agreement or covenant therefor, in-

[384] New York v. Brooklyn etc. Ins. Co., 41 Barb. (N. Y.) 231.

[385] New York v. Hamilton Ins. Co., 10 Bosw. (N. Y.) 537. See, also, Mayor etc. v. Exchange F. Ins. Co., 3 Abb. App. Dec. (N. Y.) 261; 9 Bosw. (N. Y.) 424; 34 How. Pr. (N. Y.) 103; Miltonberger v. Beacon, 9 Pa. St. 198.

[386] Simons v. Van Ingess, 86 Pa. St. 330; Thomas v. Vonkapff, 6 Gill & J. (Md.) 372.

[387] Home Ins. Co. v. Gibson, 72 Miss. 58; 24 Ins. L. J. 458; 17 S. Rep. 13.

[388] Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13; Tongue v. Witwell, 31 Md. 302; Sherwood v. Harrall, 39 Conn. 333; Allen v. Sun Mut. Ins. Co., 36 La. Ann. 767; Mitchell v. Home Ins. Co., 32 Iowa, 421; Laurent v. Chatham F. Ins. Co., 1 Hall (N. Y.), 41; Fowle v. Springfield F. & M. Ins. Co., 122 Mass. 191; Lawrence v. St. Marks F. Ins. Co., 43 Barb. (N. Y.) 479; Fletcher v. Connecticut Ins. Co., 18 Pick. (Mass.) 419; Philadelphia Tool Co. v. British American Assur. Co., 132 Pa. St. 236; 25 Week. Not. Cas. 370.

[389] Fowle v. Springfield F. & M. Ins. Co., 122 Mass. 191.

[390] Georgia Home Ins. Co. v. Jonas, 49 Miss. 80; Niblo v. North American Ins. Co., 1 Sand. (N. Y.) 551.

[390a] Creighton v. Homestead F. Ins. Co., 17 Hun (N. Y.), 78.

sure the lessor's interest.[391] So a lessee of land for a term of years who erects a building thereon, with the right reserved to remove the same, is the absolute owner thereof, and may insure it as such, and is not bound to disclose the extent of his interest in the land, although the policy provides that if the interest be a leasehold or other interest not absolute, it must be so stated and expressed in the policy.[392] And where the lessee of a plantation builds a gin-house thereon, under an agreement that his lessor shall buy the gin-house at the close of the lease at a price to be then agreed on, the lessee is the owner, and has an insurable interest therein, so as to recover on a loss occurring during the lease.[393] But it is held that a holder of a leasehold interest must specially disclose his interest where he insures in a mutual company.[394] The lessee may covenant to insure for the benefit of the lessor, and this qualifies the covenant for rent, and the obligation terminates with the destruction of the property.[395] And while the lessee may ordinarily describe the property as his own,[396] yet in such case a policy in his own name is not a performance of the covenant.[397] A lessee who has agreed to insure the premises for a certain sum, and who describes the property as "his building," may recover to the amount insured.[398] If the lessor takes out a policy for the lessee's benefit, the latter may claim the amount thereof, the option to purchase being exercised.[399] And where the lessee takes out a policy in the lessor's name, payable to himself, intending to insure for the benefit of both, and thereafter assigns the policy to the lessor, the latter may recover. It appeared in this case that there was an option to purchase and that the policy was taken by the lessee in view of certain contemplated im-

[391] Hidden v. Slater F. Ins. Co., 2 Cliff. (C. C.) 266.

[392] Hope etc. Ins. Co. v. Brolaskey, 35 Pa. St. 282; Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419.

[393] Allen v. Sun Mut. Ins. Co., 36 La. Ann. 767.

[394] Mutual Assurance Co. v. Mahan, 5 Call. (Va.) 517.

[395] Whitaker v. Hawley, 25 Kan. 674; 37 Am. Rep. 277. See as to discharge of lessee's covenant to pay insurances, Quincy v. Carpenter, 135 Mass. 102.

[396] Fowle v. Springfield F. & M. Ins. Co., 122 Mass. 191.

[397] Keteltas v. Coleman, 2 E. D. Smith (N. Y.), 408.

[398] Lawrence v. St. Marks F. Ins. Co., 43 Barb. (N. Y.) 479.

[399] Gilbert v. Post, 28 Ohio St. 276.

provements which he never made.[400] If the lessee covenant to procure insurance he may become liable for damages sustained if he neglects to perform his covenant.[401] A homestead lessee may insure where he has made improvements.[403] Where the lessees of a colliery, whose lease required them to return the property in good order at the end of the term, effected an insurance on the coal-breaker, shafting, etc., "this to insure all their working interest," and the slope fell in, and afterward the breaker, shafting, etc., were burned, it was held that they could recover the value of the property, although by such falling in their working interest was of less value than the amount insured, and that their insurable interest was the value of the property they were bound to replace.[404] If a tenant violates the conditions of a policy of fire insurance, although without the knowledge of the owner, it is void,[405] and surrendering the possession upon notice, or otherwise yielding up the premiums, terminates the lessee's interest.[406]

§ **962. Purchaser from Lessee.**—Where one purchases hay from the lessee, which the latter has covenanted to feed to stock and not to sell without the lessor's consent, such purchaser acquires thereby no insurable interest in the hay, even though he enters into possession of the premises, intending to make that use of the hay which the lease requires.[407]

§ **963. Tenant at Sufferance.**—Where possession is held by virtue of a contract, which provides that upon failure to perform certain conditions the agreement shall become void, the holding becomes merely that of a tenant at sufferance, and the insurable interest ceases upon nonperformance of said terms and surrender of possession upon notice to quit.[408]

[400] Hand v. Williamsburgh City F. Ins. Co., 57 N. Y. 41.

[401] Hey v. Wyche, 12 L. J. Q. B. 83; Charles v. Altin, 15 Com. B. 46, 65; Rhone v. Gale, 12 Minn. 54; Gregory v. Wilson, 9 Hare, 683; Doe v. Peck, 1 Barn. & Adol. 428; Ex parte Bateman, 20 Jur. 265.

[403] Creech v. Richards, 76 Ga. 36.

[404] Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13.

[405] Steinmetz v. Franklin Ins. Co., 6 Pa. St. 21.

[406] Birmingham v. Empire Ins. Co., 42 Barb. (N. Y.) 457.

[407] Heald v. Builders' Ins. Co., 111 Mass. 38.

[408] Birmingham v. Empire Ins. Co., 42 Barb. (N. Y.) 457.

§ **964. Life Tenant.**—One in possession for life of a building which he has agreed with the owner to care for, repair, keep insured, and pay the taxes, has an insurable interest therein.[409] So a husband in possession of land and the buildings erected thereon, and to whom his wife gives a life estate therein, remainder to the wife, has an insurable interest in the premises.[410] And if the life tenant insures the buildings in his own right, and independent of any agreement with the remainderman, the insurance money inures to his benefit;[411] certainly, to the extent of his interest, although this case goes farther, and holds him entitled to the entire sum to use in repairing, rebuilding, or not, as he may choose. It is held not obligatory upon a life tenant to insure and apply the amount received to rebuilding the property destroyed,[412] yet it is held that a life tenant must restore an insured building if injured by fire.[413] Although one holds a life estate only and declares in his proofs of loss that he owns the property, this is not such a false swearing as precludes a recovery, where he attaches to the deposition, as a part thereof, a copy of the deed under which he claims, and which shows the nature of his interest to be a life estate.[414]

§ **965. Remainderman.**—A remainderman has an insurable interest in the buildings, especially where he is in possession, and in the latter case he may insure even before the reconveyance of the life estate.[415]

§ **966. Tenant for Life and Remainderman Joining in Insurance.**—In such case each has a like interest in

[409] Berby v. American C. Ins. Co., 30 N. Y. St. Rep. 53. See Cross v. National F. Ins. Co., 132 N. Y. 133; 43 N. Y. St. Rep. 482; 30 N. E. Rep. 390; 21 Ins. L. J. 571; Kearney v. Kearney, 17 N. J. Eq. 505; Brough v. Higgins, 2 Gratt. (Va.) 408.

[410] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354.

[411] Haxall v. Shippen 1 Leigh (Va.), 437.

[412] Home Ins. Co. v. Field, 42 Ill. App. 392; 24 Chi. Leg. News, 122.

[413] Brough v. Higgins, 2 Gratt. (Va.) 408.

[414] Andes Ins. Co. v. Fish, 71 Ill. 620.

[415] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354; 15 Am. Dec. 424. See Kearney v. Kearney, 17 N. J. Eq. 505; Brough v. Higgins, 2 Gratt. (Va.) 408; Fireman's Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47; Curry v. Connecticut Ins. Co., 10 Pick. (Mass.) 535.

the amount of insurance, where the building or insured property is entirely destroyed, as they had in such property.[416]

§ 967. **Tenant Per Autre Vie—Life Risk.**—A tenant holding property or estates during the life of another has an insurable interest in the latter's life.[417]

§ 968. **Tenant in Common.**—A tenant in common has an insurable interest to the extent of his interest in the property,[418] and such tenant may claim from his contenants his share of the insurance money realized under a lease of the entire property[419] and where such tenant purchases his cotenant's interest, and pays the consideration therefor, he has an insurable interest in the entire property, although the agreement is merely oral and no deed has passed.[420] But the tenant in common of a vessel has no right, merely in virtue of such relation, to cause insurance to be made on property on board for his cotenant.[421]

§ 969. **Tenant by Curtesy.**—A husband has an insurable interest in property in which he is tenant by curtesy.[422] So a husband in possession and enjoyment with his wife of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both, and, where the intention was evinced to insure the whole ownership, may recover the whole loss.[423]

[416] Haxall v. Shippen, 10 Leigh (Va.), 536, cited in Brough v. Higgins, 2 Gratt. (Va.) 410.

[417] Parsons v. Bignold, 15 L. J. Ch. 379; 13 Sim. 518.

[418] Annerly v. De Saussure, 26 S. C. 505.

[419] Starkes v. Sikes, 8 Gray (Mass.), 609; 69 Am. Dec. 270. But see Annerly v. De Saussure, 26 S. C. 505.

[420] Warner v. Milford Mut. F. Ins. Co., 153 Mass. 335; 26 N. E. Rep. 877.

[421] Foster v. United States Ins. Co., 11 Pick. (Mass.) 86.

[422] Abbott v. Hampden Ins. Co., 30 Me. 414; Insurance Co. v. Drake, 2 B. Mon. (Ky.) 47; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 43; Goulstone v. Royal Ins. Co., 1 Fost. & F. 276; Mutual F. Ins. Co. v. Deale, 18 Md. 26.

[423] Trade Ins. Co. v. Barracliff, 45 N. J. L. (16 Vroom) 543; 46 Am. Rep. 792; Harris v. York etc. Ins. Co., 50 Pa. St. 341.

§ 970. Vendee or One Under Contract for Purchase or for Deed of Tenancy.—Whether or not a tenancy of any kind exists between a vendor and vendee in possession under a contract of purchase is a disputed question.[424] In case of default in performance of the conditions of his contract, it would have a bearing upon the issue of the purchaser's insurable interest, whether he be considered a tenant liable for rent or merely a trespasser. The question of insurable interest, under such circumstances, may be determined by analogous cases, although it is held that the fact that a purchaser under a contract for conveyance is paying rent does not affect his right to recover upon a policy covering his interest as purchaser.[425] But in another case, where the contract for a deed provided that upon default it might be declared void, and the purchaser treated as a tenant holding over without right, and the owner of the legal title might take possession, it was held that upon default a surrender of possession terminated whatever insurable interest the purchaser had.[426] Again, M. conveyed property worth three thousand five hundred dollars to secure a debt of fifteen hundred dollars, taking back a lease for eight years at a rent of one hundred and five dollars per annum, with the privilege of purchasing during the term on payment of fifteen hundred and ten dollars. He procured a policy of insurance upon his interest as "lessee," the company having notice of his right of redemption. Two months before the end of the term, and before he had elected to purchase, the premises were destroyed by fire, and it was held that the policy covered his right to purchase.[427]

[424] See Gear's Landlord and Tenant, sec. 35.
[425] Mutual F. Ins. Co. v. Wagner (Pa.), 7 Atl. Rep. 103.
[426] Birmingham v. Empire Ins. Co., 42 Barb. (N. Y.) 457.
[427] Creighton v. Homestead F. Ins. Co., 17 Hun (N. Y.), 78.

CHAPTER XXVIII.

INSURABLE INTEREST—CONTINUED.

Particular Insurable Interests—Continued.

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§1073. Benefit societies: Insurable interest.

Particular Insurable Interests—Continued.

§ 977. Vendee or One Under Contract for Purchase or for Deed.—It is well settled by numerous decisions that a vendee or purchaser in possession under a contract for purchase or for a deed has an insurable interest. He is treated as the owner of the whole estate encumbered only by the purchase money. Although he has the equitable title only, its loss or destruction falls upon him, and not the seller. This ownership results from the contract itself, for it is not necessary that any part of the purchase money should be paid to produce such effect. Where the vendor or grantor retains his legal title, he can use it only to enforce the payment of the price agreed upon or the unpaid purchase money. When a part of the purchase money is paid, the interest of the purchaser is not circumscribed by the amount paid, but embraces the entire value of the land over and above the purchase money due.[1] The facts in the case referred to in the last note were these: The plaintiff had purchased the land in question, to be paid for in three annual payments. He insured the buildings thereon without having paid any part of the purchase money. Improvements were made upon the property and certain assignments by both grantor and grantee, but the question at issue was whether the purchaser's interest in the property was such as was required by the contract with the insurance company, the policy providing that it should be void if the interest of the assured was other than the entire, unconditional, and sole ownership, or if the

[1] Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460; 26 Cent. L. J. 628, on rehearing, per Clark, J.

property was on ground not owned by the assured in fee simple, the defense being that at the time the insurance was effected the insured was not the absolute owner of the premises insured, and the court concludes as follows: "We are of the opinion, upon a full examination of this case in the light of all the authorities, that Seeley's (the vendee's) title under this contract must be regarded as equivalent to a fee simple; that the unpaid purchase money must be treated as an encumbrance upon it, and that in respect of the insurance he must be considered the entire, unconditional, and sole owner. The previous decisions of this court will justify no other conclusion, and the cases in the other states and the views of the text-writers we find to be in harmony with our own." [2] A vendee, under a completed agreement for sale of a deed of trust and note secured thereby,

[2] The following cases support the rule and the above decision: Milligan v. Equitable Ins. Co., 16 U. C. Q. B. 314; Brogan v. Manufacturers' etc. Ins. Co., 29 U. C. C. P. 414; Hough v. City Ins. Co., 29 Conn. 10; Grange Mill Co. v. Western Assur. Co., 118 Ill. 396; Insurance Co. v. Nelson, 65 Ill. 415; Bonham v. Iowa Central Ins. Co., 25 Iowa, 328 (part payment made); Ayres v. Hartford F. Ins. Co., 17 Iowa, 176; Cottingham v. Fireman's Fund Ins. Co., 90 Ky. 439; 14 S. W. Rep. 417; Calhoun v. Belden, 3 Bush (Ky.), 674; Leed v. Williamsburg City F. Ins. Co., 74 Me. 537 (chattels); Gilman v. Dwelling-House Ins. Co., 81 Me. 488; 17 Atl. Rep. 544; Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 259 (part payment made); Marks v. Tichenor, 85 Ky. 536; 4 S. W. Rep. 225; Dupreau v. Hibernian Ins. Co., 76 Mich. 615; 43 N. W. Rep. 585; 5 L. R. Annot. 671 (part payment made); Holbrook v. St. Paul F. etc. Ins. Co., 25 Minn. 229 (personal property); Lingonfeltre v. Phœnix Ins. Co., 19 Mo. App. 252; Michael v. St. Louis Mut. F. Ins. Co., 17 Mo. App. 23 (personal property); Franklin F. Ins. Co. v. Martin, 40 N. J. L. (11 Vroom) 568; 29 Am. Rep. 271; Pelton v. Insurance Co., 77 N. Y. 605; Noyes v. Insurance Co., 54 N. Y. 668; Draper v. Comm. Ins. Co., 21 N. Y. 378; Kenney v. Clarkson, 1 Johns. (N. Y.) 385; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90; McGivney v. Phœnix F. Ins. Co., 1 Wend. (N. Y.) 85; Shotwell v. Jefferson Ins. Co., 5 Bosw. (N. Y.) 247; Manley v. Insurance Co. of North America, 1 Lans. (N. Y.) 20; Insurance Co. v. McCullock, 21 Ohio. 176; Elliott v. Ashland Mut. F. Ins. Co., 117 Pa. St. 548; 12 Atl. Rep. 676; Mutual F. Ins. Co. v. Wagner (Pa.), 7 Atl. Rep. 103 (part payment); Insurance Co. v. Daugherty, 102 Pa. St. 568; Insurance Co. v. Wilgus, 88 Pa. St. 107; Woodward v. Tudor, 81 Pa. St. 382; Siter's Appeal, 26 Pa. St. 180; Thompson v. Carpenter, 4 Pa. St. 132; Tuckerman v. Home Ins. Co., 9 R. I. 414; Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.), 130; East Texas F. Ins. Co. v. Dyches, 56 Tex. 565; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.)

has an insurable interest in the property, even though the vendor has not indorsed the note.[3]

§ 978. **One Holding Possession Under Contract of Purchase from Equitable Owner.**—One holding possession under contract of purchase from the equitable owner has an insurable interest.[4]

§ 979. **Same Subject—Parol Agreement.**—A person in possession under a parol agreement of purchase, who has paid part of the purchase money, has an equitable interest in the premises, which is insurable.[5] And one may insure an interest in a vessel derived under an oral contract to purchase;[6] although in England, where one orally agreed to purchase oil to arrive by a certain vessel, and insured the same and profits thereon, it was held that he had no insurable interest in the oil, because the contract was not in writing.[7]

§ 980. **Same Subject — Qualifications.**—The rule is qualified, however, in some of the cases. Thus, provided there is no requirement or condition in the policy that the insured disclose the true state of the title;[8] that no lien for the purchase money or encumbrance of any other character exists upon the property;[9] that the insured is not specifically inquired of as to his title.[10]

25; 1 Pet. (U. S.) 151; Rumsey v. Insurance Co., 17 Blatchf. (C. C.) 527; 2 Fed. Rep. 429 (part payment made); Simons v. Marine Ins. Co., 2 Cranch (C. C.), 618; Lewis v. New England F. Ins. Co., 29 Fed. Rep. 496. But see Lasher v. St. Joseph F. & M. Ins. Co., 86 N. Y. 423.

[3] International Trust Co. v. Norwich Union F. Ins. Co., 71 Fed. Rep. 81; 17 U. S. C. C. A. 608.

[4] Carpenter v. German-American Ins. Co., 135 N. Y. 298; 47 N. Y. St. Rep. 862; 31 N. E. Rep. 1015.

[5] Tuckerman v. Home Ins. Co., 9 R. I. 414; Hough v. Insurance Co., 29 Conn. 10.

[6] Amsinck v. American Ins. Co., 129 Mass. 185.

[7] Stockdale v. Dunlap, 6 Mees. & W. 224.

[8] Franklin F. Ins. Co. v. Martin, 40 N. L. J. (11 Vroom) 568; 29 Am. Rep. 271.

[9] Bontram v. Iowa Central Ins. Co., 25 Iowa, 328.

[10] Draper v. Commercial Ins. Co., 21 N. Y. 378.

§ 981. Same Subject—Cases.—One who has given notes for the payment of the purchase money, under a contract for conveyance of the property, has an insurable interest, notwithstanding the notes are past due and unpaid, the vendor having taken no steps to compel their payment.[11] So a holder or assignee of a bond for a deed may insure,[12] and one who has erected buildings upon land, the title to which is to be conveyed to him on the performance of certain conditions, has an insurable interest.[13] So the purchaser of real estate by articles, being responsible for the price payable, is liable for the whole loss, including that of the buildings by fire, and may insure;[14] and one who has agreed to purchase a building, and paid interest on the purchase money and made improvements, may insure to the full value.[15] So one who has possession under a contract for a deed to a part may insure the whole, he having also a deed for the other part.[16] Again, one who has a right to purchase a cargo from which profits are expected has an insurable interest.[17] In another case, a British vessel was purchased from merchants in Jamaica, but the purchaser being unable to pay the entire purchase money, it was agreed that she should remain in the name of the original owners, until the balance was paid, when they should give a regular bill of sale. The purchaser took possession and appeared as owner of the vessel. In an action on a policy of insurance effected on the vessel in the name of the purchaser it was held that he had an insurable interest.[18] But the mere agreement to rescind does not of itself terminate the interest; such rescission must be consummated.[19]

[11] Gilman v. Dwelling-House Ins. Co., 81 Me. 488; 17 Atl. Rep. 544.

[12] Ayres v. Hartford Ins. Co., 17 Iowa, 176; Oakman v. Dorchester Mut. Ins. Co., 98 Mass. 57.

[13] Southern Ins. etc. Co. v. Lewis, 42 Ga. 587; Oakman v. Dorchester Mut. Ins. Co., 98 Mass. 57.

[14] Reed v. Lukens, 44 Pa. St. 200; Hough v. Insurance Co., 29 Conn. 10.

[15] McGivney v. Phœnix Ins. Co., 1 Wend. (N. Y.) 85.

[16] Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25.

[17] French v. Hope. Ins. Co., 16 Pick. (Mass.) 397.

[18] Kenney v. Clarkson, 1 Johns. (N. Y.) 385; 3 Am. Dec. 336.

[19] McCutcheon v. Ingraham, 32 W. Va. 378; 19 Ins. L. J. 32.

§ 982. Vendor or One Who has Contracted to Convey. A vendor or one who has contracted to convey to another either real or personal property, and who retains the legal title until the conditions are performed which would entitle the purchaser to a conveyance, has an insurable interest in the property; but the conveyance being made, the interest ceases.[20] And where the property sold consists of a factory and machinery therein, he may insure the entire property.[21] And the purchaser may insure for the vendor's interest, which is not defeated by the fact that the property is mortgaged and other insurance procured thereon without the seller's knowledge, especially where the insurer's agent receives from the seller the premium for renewal of the original policy.[22] And where the vendor contracts to insure for the benefit of the vendee, but takes the policy in his own name, it being understood to be a compliance with the agreement, and the vendor collects the money after loss in an action for specific performance of the contract to convey, an offer to allow the amount of insurance collected is a good offer of payment of the balance due, where such insurance money amounts to such balance, and the vendor is liable for the full amount of the policy, although he settles for a less sum.[23] So a vendor retaining possession of goods by agreement of parties, and holding the policies of insurance which he had previously procured thereon as collateral security for the payment of the residue of the purchase money, re-

[20] McSweeney v. Royal Ex. Assur. Co.. 14 Q. B. 634; Reed v. Cole, 3 Burr. 1512; Bell v. Fireman's Ins. Co., 3 Rob. (La.) 423; Brewer v. Herbert, 30 Md. 301; Boston etc. Co. v. Suffolk F. Ins. Co., 12 Allen (Mass.), 381; Stetson v. Massachusetts F. & M. Ins. Co., 4 Mass. 330; Providence County Bank v. Benson, 24 Pick. (Mass.) 204; Folsom v. Belknap etc. Ins. Co., 10 Fost. (N. H.) 231; Acer v. Merchants' Ins. Co., 57 Barb. (N. Y.) 68; Tallman v. Atlantic F. & M. Ins. Co., 4 Abb. App. Dec. (N. Y.) 345; Vairin v. Canal Ins. Co., 10 Ohio, 561; Insurance Co. v. Updegraff, 21 Pa. St. 513; Perry County Ins. Co. v. Stewart, 19 Pa. St. 45; Warder v. Horton, 4 Binn. (Pa.) 529; Fire & Mar. Ins. Co. etc. v. Morrisson, 11 Leigh (Va.), 354; 36 Am. Dec. 385; Holbrook v. American Ins. Co., 1 Curt. (C. C.) 193. But see McCulloch v. Indiana Mut. F. Ins. Co., 8 Blackf. (Ind.) 50.

[21] Wood v. Northwestern Ins. Co., 46 N. Y. 421.

[22] Tallman v. Atlantic F. & M. Ins. Co., 4 Abb. App. Dec. (N. Y.) 345.

[23] Allyn v. Allyn, 154 Mass. 570; 28 N. E. Rep. 779.

tains an insurable interest in the goods.[24] Again, if the owner insures the buildings and afterward contracts to sell them, and a loss occurs before performance of the conditions by the purchaser, the seller may recover, notwithstanding the stipulations of the policy that it should be void in case of alienation "by sale or otherwise," or "transferred by a contract" or change of ownership.[25] Nor is it any defense that the vendor had made such contract, and had received an installment of the purchase money.[26] And where a conveyance is made and the grantee reconveys to a trustee to secure the purchase money, both acts are to be regarded as one transaction, and the grantor retains an insurable interest, and can recover to the extent of the same.[27] And one who has agreed to sell, may insure before the execution of the deed.[28] Thus, where at the time the policy was issued the plaintiff was the owner of a boat, but had agreed to sell it to another, and the sale was not completed by the execution of the contract, the vendor has an insurable interest.[29]

§ **983. Vendor.**—If a vendor has not absolutely parted with all his interest in the property, he has an insurable interest to the extent of that retained.[30] So where A exchanged a mill, which was insured, for certain land, the deeds to be deposited in escrow until certain mortgages on the land should be satisfied, and A secretly caused the deeds to be recorded, and thereafter purchased the land under a foreclosure sale and transferred it to another, it was held that A had an insurable interest to the extent of the mortgage.[31] A vendor of land on which is a building has an insurable interest therein, which the company is estopped to deny, where, although he delivers the deed, he does not transfer the policy, but pays the assess-

[24] Norcross v. Insurance Cos., 17 Pa. St. 429; 55 Am. Dec. 571.

[25] Hill v. Cumberland etc. Protection Co., 59 Pa. St. 474.

[26] Boston & Salem Ice Co. v. Royal Ins. Co., 12 Allen (Mass.), 381.

[27] Morrison v. Tennessee M. & F. Ins. Co., 18 Mo. 262.

[28] Gill v. Canada F. & M. Ins. Co., 1 Ont. Rep. 347; Insurance Co. v. Updegraff, 21 Pa. St. 513.

[29] Bell v. Fireman's Ins. Co. etc., 3 Rob. (La.) 423. See Stuart v. Columbian Ins. Co., 2 Cranch (C. C.), 442.

[30] Norcross v. Insurance Co., 17 Pa. St. 429; 55 Am. Dec. 571.

[31] People's Ins. Co. v. Strachle, 2 Cin. (Ohio) 186.

ments thereon up to the time of the loss, and also takes a judgment for a part of the purchase price, and the facts are known to the insurer's secretary.[32] And a vendor of a steamboat has an insurable interest after the sale in the same manner as vendors of other property, and if he has taken a mortgage to secure the purchase price, which is invalid, its invalidity does not affect his insurable interest.[33] So the vendor of a ship retains an interest therein, which is insurable, where he has sold it under an agreement that he will pay the purchaser a sum certain if a loss happens within a specified time, even though the insurance be in a mutual company.[34] And one who sells goods to be paid for on delivery may insure them pending the change of ownership.[35] If the sale does not vest the absolute title until arrival of the goods, the vendor's lien thereon gives him an insurable interest while the lien exists, which a stoppage in transitu does not divest, on the principle that a stoppage in transitu does not rescind the sale, and the vendor may sue for the price, provided he be ready to deliver the goods upon payment.[36] But if one makes an absolute conveyance of land, but remains in possession, the purchaser agreeing to pay therefor out of the proceeds of a contemplated sale if he shall realize enough over the encumbrances, or such balance as shall remain after satisfying the encumbrances, he has no insurable interest in the land.[37] And if a person sells and conveys to another before the fire, and receives a portion of the purchase money, and takes a judgment for the unpaid balance thereof, he retains no insurable interest, since the judgment is only a general lien

[32] Light v. Countrymen's Mut. F. Ins. Co., 169 Pa. St. 310; 32 Atl. Rep. 439.

[33] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[34] Reid v. Cole, 3 Burr. 1512.

[35] Ætna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242. See, also, Home Ins. Co. v. Heck, 65 Ill. 111. "Sold, but not delivered," applies to property sold, but of which the ownership has not been changed by delivery. For distinction between this clause and "sold, but not removed," see Waring v. Indemnity F. Ins. Co., 45 N. Y. 606.

[36] Newhall v. Vargas, 15 Me. 314, where this was directly so decided; Kymer v. Suwer-Cropp, 1 Camp. 109; 2 Kent's Commentaries, 5th ed., 541.

[37] Balow v. Teutonia Farmers' Mut. F. Ins. Co., 77 Mich. 540; 43 N. W. Rep. 924.

which must be satisfied first out of personal estate, and is not a specific lien, as in case of a mortgage.[38] Nor does the fact that the vendor, who had been paid for the goods, holds a wharfinger's warrant for the payment of certain charges give him an insurable interest.[39] And the seller of outfits who surrenders them into the possession of the purchaser, the master of vessel, has no insurable interest therein, even though the purchaser agrees to give the customary lien, it appearing that they were sold unconditionally; and it was held that giving possession to the master destroyed the seller's lien, and that the use of the outfits would destroy their identity.[40]

§ **984. Vendee.**—One who has received a deed of property and taken possession under a claim of ownership in fee simple has an insurable interest, and the validity of his title cannot be questioned by the insurers.[41] So proof that a plaintiff himself purchased goods and paid for them is prima facie evidence of an insurable interest.[42] And a purchaser in possession of a house has an insurable interest to the full value of the house, and may recover such value within the amount insured upon a total loss, notwithstanding a previous policy taken out by his vendor upon the same property.[43] The purchaser of a vessel on which there is a bottomry bond without his knowledge may insure his interest.[44] And where a cargo of linseed was to be delivered at the port of destination in sound merchantable condition, payment to be made after delivery, and it arrived safely at the port of delivery, but a part of the cargo was lost by the sinking at the wharf of a lighter on which it was put, but at the time no payment had been made by the purchaser, it was held that he could not recover on a policy on the cargo assigned to him by the seller, there being no agreement at the time of sale that it should carry the insur-

[38] Grevemeyer v. Southern etc. Ins. Co., 62 Pa. St. 340.

[39] North British Ins. Co. v. Moffat, L. R. 7 Com. P. 25.

[40] Folsom v. Merchants' Mut. Ins. Co., 38 Me. 414. But see Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132.

[41] Home Ins. Co. v. Gilman, 112 Ind. 7; 13 N. E. Rep. 118.

[42] Sturm v. Atlantic Ins. Co., 38 N. Y. Supp. 281; 63 N. Y. 80.

[43] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90.

[44] Williams v. Smith, 2 Caines (N. Y.), 13.

ance.[45] And one to whom goods are consigned to vest in him on arrival has an insurable interest in them from such time, and if they are shipped at his risk, or are to be at his risk from the time of sale, he may insure at once.[46] And where oats had been sold to A, and he being informed that they were to be shipped in a packet on his account insured them, but the packet refused to touch at the port of delivery, and the vendor sold them again to another to whom he delivered the bill of lading, it was held that an assignment of the policy by A to the seller did not affect the validity of the policy, and a recovery might be had thereunder for the benefit of the person to whom the property had passed.[47] So a vendee who has the legal title and possession of household furniture may insure it as his, although it is in the custody of another in a house occupied by the latter, and although the policy does not state such fact, but merely describes the house and its location.[48] But one claiming property under conveyances to and from a fictitious person has no insurable interest therein, unless in possession at the time the policy of insurance is issued. In such case, the conveyance from a fictitious grantor raises no presumption of possession thereunder.[49] If one has the full title to personal property, he has an insurable interest therein, even though he is bound to account to another for a portion of the proceeds therefrom.[50]

§ **985. Purchaser Under Execution Sale.**—Where property is levied on and sold under execution, the purchaser has an insurable interest therein,[51] even though he neither pays money nor takes a deed therefor.[52] In this last case, however, the nature of the interest was fully disclosed to the insurer.[53]

[45] North of England etc. Co. v. Archangel Maritime Ins. Co., 10 L. R. Q. B. 249.

[46] Fragam v. Long, 4 Barn. & C. 219.

[47] Sparks v. Marshall, 2 Bing. (N. C.) 761; 3 Scott, 172.

[48] Little v. Phœnix Ins. Co., 123 Mass. 380; 25 Am. Rep. 96.

[49] David v. Williamsburgh City F. Ins. Co., 7 Abb. N. C. (N. Y.) 47.

[50] Queen Ins. Co. v. Leonard (Ohio, 1895), 33 Week. L. Bull. 46; 9 Ohio C. C. 46.

[51] Curtis v. Home Ins. Co., 1 Biss. (C. C.) 485.

[52] Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.), 139.

[53] Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.), 139.

And where such purchaser agreed to sell to another, and received the consideration, the last vendee was held to be in equity the absolute and sole owner, even though he had not the deed thereof, it having been executed to another by mistake.[54] So such a purchaser has an insurable interest even though the validity of his title is being contested.[55]

§ 986. Purchaser in Possession of Land, Title not to Pass till Building Completed.—A purchaser in possession of real estate has an insurable interest therein, even though the title is not to pass till a building is completed in a limited time therefor, to be specified in the contract, the building being destroyed before that time; the purchase price having been paid and deeds executed after the loss.[56]

§ 987. One in Possession Under Claim of Right.—If a person is in possession of real estate under a bona fide claim of right, to the exclusive use and enjoyment of the same, and there is no claim of adverse right or interest therein by any other person, he has an insurable interest in the property, and is the entire, sole, and unconditional owner.[57] So one who holds goods under a claim of right has an insurable interest therein, notwithstanding a liability may exist for their conversion by him,[58] and under such claim and holding the fact that the title is defective, or insolvent, or even fraudulent, will not affect the insurance.[59] So where a party has possession of property at the time of the insurance and of the loss, he is entitled to recover the entire amount insured, notwithstanding there may be a question as to the validity of his title.[60]

[54] Lebanon Mut. Ins. Co. v. Erb. 112 Pa. St. 149; 4 Atl. Rep. 8.

[55] Frierson v. Brenham. 5 La. Ann. 540.

[56] Duprey v. Delaware Ins. Co. (U. S. C. C. W. D. Va. 1895), 24 Ins. L. J. 161; 63 Fed. Rep. 680.

[57] Miller v. Alliance Ins. Co. of Boston, 7 Fed. Rep. 649. See Stevenson v. London etc. F. Ins. Co., 26 U. C. T. Rep. 148. See sec. 977 herein.

[58] New York v. Brooklyn Ins. Co., 41 Barb. (N. Y.) 231.

[59] Travis v. Continental Ins. Co., 32 Mo. App. 198; Stockdale v. Dunlap, 6 Mees. & W. 224; Phœnix Ins. Co. v. Mitchell. 67 Ill. 43.

[60] Frierson v. Brenham, 5 La. Ann. 540; 52 Am. Dec. 603.

§ **988. One in Possession with Power of Sale.**—One in possession of property belonging to another, with a power of attorney to sell the same, and who has advanced a portion of the purchase money on the property, has an insurable interest therein.[61]

§ **989. One in Possession to Care for and Rent Property.**—One in possession under an agreement to care for and rent property and to keep it insured, has an insurable interest in the same, notwithstanding neither a legal or equitable title in the land is vested in him.[62]

§ **990. One in Possession—Generally.**—A railroad company has an insurable interest in freight cars in its possession and use belonging to another company.[63] So proof of possession and actual occupancy will sustain an insurable interest.[64]

§ **991. Mere Intruder or Trespasser.**—One who is a mere intruder or trespasser, without title or color of title, who has entered without license or authority, has no insurable interest in the property.[65]

§ **992. Disseisor.**—The disseisor is so far the owner as to have an insurable interest in the property.[66] In this case the court said: "A person seised of lands under a title by disseisin may be considered as the owner, especially if the disseisee's right of entry has been tolled; for if the disseisee has not a right to enter, but only a right of action, he is not the absolute owner of the land. The disseisor is the owner though his title may be defeasible."

§ **993. Purchaser of Legacy—Life Risk.**—If one purchases a legacy to which another will be entitled on arriving

[61] Brugger v. State Investment Ins. Co., 5 Saw. (C. C.) 304.

[62] Cross v. National F. Ins. Co., 132 N. Y. 133; 43 N. Y. St. Rep. 482; 30 N. E. Rep. 390.

[63] Commonwealth v. Hide & Leather Co., 112 Mass. 136.

[64] Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co., 1 Gilm. (Ill.) 236. See People's F. Ins. Co. v. Heart, 24 Ohio St. 331.

[65] Sweeny v. Franklin Ins. Co., 20 Pa. St. 337.

[66] Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

at a certain age, he has an insurable interest in the legatee's life, and the fact that during the continuance of the policy the legatee attains the age at which he would have been entitled to receive the legacy, does not defeat the right of the purchaser to recover on the policy, the legatee having died before the term expired for which the policy was issued.[67]

§ **994. Owner—Absolute Interest.**—An absolute interest in property is an interest which is so completely vested in the individual, that he cannot be deprived of it without his consent.[68] But an absolute right of property does not necessarily constitute an ingredient in determining the question of insurable interest;[69] for if one insures under a statement that he is the owner, he is only bound to prove an insurable interest, which is such a title as that, should there be a loss without insurance, it would fall upon him.[70] But the prima facie presumption of seisin in fee, arising out of the possession and occupation of real property by one who claims to be the owner thereof, is sufficient, in the absence of proof of an outstanding title in others, or of any encumbrance on the property to show an insurable interest therein.[71] If one owns a mill and insures it in his name as owner, his right to recover is not defeated by an agreement made with another to use it in partnership, sharing the profits and loss thereof equally.[72] And a policy of insurance on goods in the name of one person is not avoided by the fact that they were purchased in the names of himself and another, with the latter's consent; the goods in fact being the sole property of the former.[73] In a Massachusetts case, A procured a policy of insurance against loss by fire "on his dwelling-house." He had previously conveyed the land on which the house stood by warranty deed to B, to secure the

[67] Law v. London Indisputable L. Pol. Co., 24 L. J. Ch. 196; 1 Jur., N. S. 178; 1 Kay & J. 223.

[68] Hough v. City F. Ins. Co., 29 Conn. 10; 76 Am. Dec. 581.

[69] Sturm v. Atlantic Mut. Ins. Co., 38 N. Y. Supp. 281.

[70] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[71] Franklin Ins. Co. v. Chicago Ice Co., 36 Md. 102.

[72] Rice v. Provincial Ins. Co., 7 U. C. C. P. 548.

[73] Gould v. Mutual F. Ins. Co., 47 Me. 403; 74 Am. Dec. 494. See Bell v. Ansley, 16 East, 141.

latter from liability as a surety on a recognizance, B at the same time, and as part of the same transaction, giving A an instrument of defeasance, which was not recorded. A loss by fire occurred, and the land was subsequently reconveyed to A. It was held that A had an insurable interest; that in the absence of any provision in the policy that the interest of the assured should be particularly described, the description in the policy was sufficient. and that a statement by him in his proof of loss that "the property belongs exclusively to me, and no one else has any interest therein," did not avoid the policy.[74] Again, where one erected a schoolhouse for the town, and, in accordance with a contract so to do, bought the land upon which it was located, and it was used as a schoolhouse by the town, and the builder and owner of the land participated in town meetings at which money was raised to insure the building, it was held a question for the jury whether the town had such an ownership as to give it an insurable interest in the building.[75] An equitable interest in property is an insurable interest, and may be insured as such,[76] or it may be insured under the general name of property.[77]

§ 995. Owner of Land—Buildings Constructing Under Contract.—The owner of land upon which buildings are being constructed under a contract for labor and materials, payment to be made when the work is completed, has an insurable interest in the buildings.[78]

§ 996. Contractors — Builders — Materialmen — Mechanics.—There would seem to be no question but that con-

[74] Walsh v. Philadelphia F. Assn., 127 Mass. 383.

[75] Batcheller v. Commercial Ins. Co., 143 Mass. 495; 10 N. E. Rep. 321.

[76] Hough v. City F. Ins. Co., 29 Conn. 10; 76 Am. Dec. 589; Hume v. Providence-Washington Ins. Co., 23 S. C. 190; Oliver v. Greene, 3 Mass. 133; Bartlett v. Walter, 13 Mass. 217; Dohn v. Farmers' Stock Ins. Co., 5 Lans. (N. Y.) 275; Strong v. Farmers' Ins. Co., 10 Pick. (Mass.) 40; 20 Am. Dec. 507.

[77] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; affirming 12 Wend. (N. Y.) 507.

[78] Foley v. Farragut F. Ins. Co., 71 Hun (N. Y.), 369; 55 N. Y. St. Rep. 7; 23 Ins. L. J. 78.

tractors and builders, both upon principle and authority, and independent of any statutory lien, have an insurable interest in buildings, or in work done thereon, while they are to receive payment on installments and a final payment on completion, and acceptance of the building by the usual form of the contract, or in case payment is only to be made on final completion.[79] A contractor has an insurable interest, to its full value, in a building being erected by him under contract to keep it insured for the owner's benefit, and where he has taken out policies in his own name, he must sue alone.[80] And where materialmen, being unwilling to furnish lumber to the owner on his credit, without security agreed with the latter that he should insure for their benefit, which was done, the policy being effected in their name both upon the lumber and the houses to be erected, it was held that they had an insurable interest, and could recover. It also appeared that the statute gave materialmen a lien, but this fact did not control the decision.[81] But where the insurance was effected by a contractor "for whom it might concern," under an agreement with the owner to divide the proceeds of the insurance, and a loss occurred, it was held that the materialman had no claim on the money paid under the policy.[82] And a carpenter to whose shop lumber is sent by the owner, to be worked up for use, has no claim upon the amount of insurance money paid to the owner under a policy effected upon the lumber for the latter's benefit.[83]

§ **997. Advances.**—An insurable interest may exist by reason of a lien for advances arising under the law, custom, or contract,[84] and if the owners of a fishing vessel have a lien

[79] Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Commercial F. Ins. Co. v. Capitol City Ins. Co., 81 Ala. 320; Mitchell v. Home Ins. Co., 32 Iowa. 421; German F. Ins. Co. v. Thompson, 43 Kan. 567; 19 Ins. L. J. 884; 23 Pac. Rep. 608.

[80] Cushing v. Williamsburgh City F. Ins. Co., 4 Wash. (C. C.) 538; 30 Pac. Rep. 736; 21 Ins. L. J. 934.

[81] Franklin F. Ins. Co. v. Coates, 14 Md. 285.

[82] Mosser v. Donaldson (Pa. 1887), 10 Atl. Rep. 766.

[83] Elchelberger v. Miller, 20 Md. 332.

[84] Seamans v. Loring, 1 Mass. 127; Russell v. Insurance Co., 4 Dall. (U. S.) 421; Marine Ins. Co. v. Winsmore, 124 Pa. St. 61. See secs. 1017, 1018, herein.

on the catch for money expended for bait, such money may be insured under the term "advances."[85] So one advancing money for supplies and repairs for and on a vessel has, by reason of his lien, an insurable interest.[86] Advances under a policy effected at Lloyds, wherein under the valuation clause the words "and advances" are inserted in writing, must be held not to cover advances for repairs where the policy in its printed portions described fully all parts of the ship, but the words must be taken to mean advances made independently of the ship.[87] If vessels and their cargoes are captured, but are thereafter restored for the benefit of the owners to one authorized to act in the premises, and he refits them, and for the expenses so incurred draws upon another who pays the drafts, the latter has an insurable interest, and one of the vessels being consigned to such person, and subsequently captured while preparing for her voyage, he may recover the sum insured.[88] So one may insure the vessel and cargo to the extent of his advance and lien thereon.[89] And a person who makes several advances for building a vessel has an insurable interest, although he never has possession, and notwithstanding they are made merely by virtue of a parol agreement, the surplus to be paid to the borrower.[90] So where the vessel's consignees refused to accept a draft drawn upon them by the master for advances made for a vessel, under an agreement that the freight should be liable, and the consignees indorsed to A, who insured as for advances on account of freight for the benefit of the indorsers who had cashed the draft, it was held that A had an insurable interest.[91] And one who advances money on the security of a bill of lading and the policy has an insurable interest in the goods.[92] So a company which advances money and machinery to a certain amount to another, who was to deliver

[85] Burnham v. Boston M. Ins. Co., 139 Mass. 399.

[86] Merchants' Mut. Ins. Co. v. Baring, 20 Wall. (U. S.) 159.

[87] Providence-Washington Ins. Co. v. Bowring, 50 Fed. Rep. 613.

[88] Robertson v. Hamilton, 14 East. 522.

[89] Seamans v. Loring, 1 Mass. 127.

[90] Clark v. Scottish Imp. Ins. Co., 4 Can. Sup. Ct. 192; reversing 2 P. & B. (N. B.) 241.

[91] Wilson v. Martin, 11 Ex. 684.

[92] Wolff v. Horncastle, 1 Bos. & P. 316, per Butler, J.

property at a specified place, and there store it and ship it as wanted, and to insure the same for the company's benefit, has an insurable interest in such property to the amount advanced, although there has been no formal delivery.[93] But where the policy insures advances, a claim for a commission for procuring a charter for the vessel is not covered, for such a claim does not constitute a lien on the vessel, and is not insurable.[94] Advances made to aid another in an enterprise, or to assist them in business, may give an insurable interest in the life of another.[95] So a father has an insurable interest in the life of a minor son who can render services, and to whom he has made advances.[96]

§ 998. Ship's General Agent has no Insurable Interest in Advances.—A ship's general agent has no insurable interest in a vessel for advances made in the course of the agency, even though he has authority, under a power of attorney, to sell, manage, direct, charter, and freight the vessel.[97] In this connection the following opinion is important. The court says: "We cannot discover that the plaintiffs had any interest in the vessel in the nature of a security for their advances, or that they occupied any relation toward the subject matter of the insurance other than that of a general creditor of the owner. A ship's husband does not have a maritime lien upon the vessel for the advances made in the course of his agency for the owners, in the absence of an express contract with them to that effect, or of peculiar circumstances from which such a contract could be implied. Presumptively, he relies upon the credit of the owners.[98] The power of attorney did not effect an hypothecation, or give the

[93] Cumberland Bone Co. v. Andes Ins. Co., 64 Me. 466.

[94] Phœnix Ins. Co. v. Parsons, 129 N. Y. 86; 41 N. Y. St. Rep. 505; 29 N. E. Rep. 87.

[95] Bevin v. Connecticut Ins. Co., 23 Conn. 144.

[96] Mitchell v. Union Ins. Co., 45 Me. 104.

[97] China Mut. Ins. Co. v. Ward (8 U. S. C. C. A. 229), 59 Fed. Rep. 712.

[98] The Larch, 2 Curt. (C. C.) 427; The Sarah J. Weed, 2 Low. (U. S.) 555; White v. The Americus, 19 Fed. Rep. 848; The Raleigh, 32 Fed. Rep. 633; The Esteban de Antunano, 31 Fed. Rep. 520.

plaintiffs an equitable lien upon the vessel. It was not coupled with an interest, or given as security to the plaintiffs, but was merely a naked power, revocable by the principal at any time.[99] It did not confer on them the right to sell the vessel for their own benefit, and any authority exercised under it would have been in law the act of the owner, and exercised solely for his benefit." [100]

§ **999. Voluntary Advances on Vessels.**—The owner of a cargo who, without a lien and without request, voluntarily advances money for repairs on a vessel, acquires thereby no insurable interest.[101]

§ **1000. One Expending Money for his Own Benefit on Another's Property.**—One acquires an insurable interest in another's real property where for his own benefit he expends money thereon with the owner's consent.[102]

§ **1001. Liens.**—Lien creditors have an insurable interest in the property to which the lien attaches,[103] and it is declared that a debt which has reference to or arises in consequence of the thing insured, and which would have given a lien thereon, gives an insurable interest; [104] and this covers mortgagees and lien creditors.[105] So a lien, or an interest in the nature of a lien, is an insurable interest, and it will make no difference if the party has a right to pursue his debtor personally for the debt on account of which the lien attached;[106] and one who holds liens against the property, and is appointed a trustee to sell it, may insure the same in a mutual company

[99] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174; Hartley's Appeal, 53 Pa. St. 212; Walker v. Denison, 86 Ill. 142; Barr v. Schroder, 32 Cal. 609; Attrill v. Patterson, 58 Md. 226.

[100] China Mut. Ins. Co. v. Ward (8 U. S. C. C. A. 229), 59 Fed. Rep. 712.

[101] Buchanan v. Ocean Ins. Co., 6 Cow. (N. Y.) 318. See Kulen Kemp v. Vigne, 1 Term Rep. 364.

[102] Looney v. Looney, 116 Mass. 283.

[103] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[104] Wolf v. Horncastle, 1 Bos. & P. 316, per Butler, J.

[105] Bell v. Western etc. Ins. Co., 5 Rob. (La.) 423; 39 Am. Dec. 542.

[106] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132.

authorized by its charter to insure any kind of property, for this expression includes personal property.[107] If the goods themselves are insured by the person claiming the lien, as agent for the owner of the goods, he cannot recover as for a total loss, in an action upon such policy, when the goods have been restored to the owner, and the owner does not satisfy the lien. There may, however, be a recovery in such case for the partial loss sustained by the owner of the goods.[108] An insurable interest also exists in favor of one who has a lien upon the cargo for contribution, the insurance being made to cover the average expenses which the insured might have to pay to satisfy the claim of the salvors, which amount of salvage was ascertained and paid by the insured.[109]

§ **1002. Mechanic's Lien.**—A mechanic's lien on property gives an insurable interest therein,[110] and in case of vessels, in so far as a statutory lien exists, it ought to give an insurable interest.[111] So one who has erected a building for the lessee upon certain land, and who has obtained a decree giving precedence to his lien, has an insurable interest, and neither the lessor nor his assigns can claim the benefit, although the lessee had covenanted to insure.[112] But it is not, in general, necessary that the validity of the lien should have first been established by a judgment, to give an insurable interest. If the labor or materials, or both, have been furnished, and the statutory lien exists at the time the policy is effected, whether the claim be filed or perfected the policy will be valid, it being sufficient that the right to a lien has not lapsed by non-compliance with the statutory requirements.[113] And a party hav-

[107] Allen v. Mutual F. Ins. Co., 2 Md. 111.

[108] Donath v. Insurance Co., 4 Dall. (U. S.) 463.

[109] Briggs v. Merchants' & Traders' Assur. Co., 13 Q. B. 167; 18 L. J. Q. B. 178.

[110] Stone v. City F. Ins. Co., 12 Iowa, 371; 79 Am. Dec. 539; Franklin Ins. Co. v. Coates, 14 Md. 285; Royal Ins. Co. etc. v. Stimson, 103 U. S. 25; Loughurst v. Star Ins. Co., 19 Iowa, 287; Mitchell v. Home Ins. Co., 32 Iowa, 421; Protection Ins. Co. v. Hall, 16 B. Mon. (Ky.) 411; Carter v. Humboldt Ins. Co., 12 Iowa, 287.

[111] See next section.

[112] Merchants' Exchange Ins. Co. v. Mazange, 22 Ala. 168.

[113] See cases under first note under this section.

ing a mechanic's lien on buildings by him erected on land then covered by mortgage has an insurable interest, limited only by their value and the amount of his claim. His discontinuance of his suit to enforce the lien after their destruction is not a matter of defense to his action on the policy.[114]

§ **1003. Mechanics and Materialmen in Ship.**—All persons who supply labor or materials in building or repairing foreign vessels, or those who furnish necessary supplies for their employment, have by the general maritime law a lien on the vessel and an insurable interest to that extent, and by foreign vessels are meant in this connection those of another state.[115]

§ **1004. Shipowner in Ship and Cargo.**—An owner of a ship has an insurable interest in it in all cases, even where one has chartered her and covenants to pay him, in case of loss, her full value.[116] So one who is only the beneficial owner, merely holding as trustee for the purpose of securing a sum of money advanced to the actual owner, has an insurable interest;[117] and the owner of a ship mortgaged to her full value has an insurable interest.[118] So the ship and cargo may be insured for part of the way,[119] and the owner of a vessel and cargo may insure in a valued policy to two ports in the West Indies the amount of the prime cost of the goods, together with the premium and freight to the first port.[120] Where defendants insured on a time policy, and plaintiffs reinsured them for a specific voyage, which voyage the vessel was then upon, and the ordinary length of which was much less than the time originally insured, it was held that the defendants had an insurable interest, and that whether the risks of both policies were coextensive was imma-

[114] Insurance Co. v. Stimson, 103 U. S. 25.

[115] The Calisto, Davies (C. C.), 29, per Ware, J.; Merchant's Mut. Ins. Co. v. Baring, 20 Wall. (U. S.) 159. See The Draco, 2 Sum. (C. C.) 157. See section preceding.

[116] Hobbs v. Hannam, 3 Camp. 93; Cal. Civ. Code, sec. 2659; 1 Arnould on Marine Insurance, Perkins' ed., 264, *258, sec. 113.

[117] Rhind v. Wilkinson, 3 Taunt. 237.

[118] Gordon v. Massachusetts Ins. Co., 2 Pick (Mass.) 249; Higginson v. Dall, 13 Mass. 96.

[119] Taylor v. Wilson, 15 East, 324, per Lord Ellenborough.

[120] Pritchett v. Insurance Co. of North America, 3 Yeates (Pa.), 458.

terial, provided the reinsurance was included by the risk originally insured;[121] and the owners may sue upon a policy in their own name where it is effected by the charterers under an agreement with them that the insurance money shall be paid over to the owners in case of a total loss, and the policy is taken on account in their name.[122]

§ **1005. Shipowner in Special Cargo—Lien.**—Where the owner of a ship engaged for the transportation of the obelisk known as "Cleopatra's Needle" from Alexandria to London, and for its erection upon a site to be thereafter selected, effected policies to cover expenses upon the goods and merchandise "in the good ship or vessel called the 'Cleopatra,' iron vessel containing the obelisk," in a valued policy against "the risk of total loss only," it was held that being owner of the ship and having possession of the obelisk, and possibly a lien thereon for his expenditure, gave him an insurable interest, certainly to the extent of his expenditures.[123]

§ **1006. Charterer.**—The charterer who has the vessel in his custody and possession has an insurable interest to the extent of his liability to damage by her loss, and may insure it in his own name, and where he has a stipulation to insure, he may insure for the benefit of the owner;[124] nor need he disclose the nature of his interest.[125] So one who has possession of the vessel with a lien has an insurable interest; as where he has contracted with the owner for a commission to man and run the vessel, holding her as a security for disbursements.[126] Charterers of a vessel have an insurable interest in

[121] Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. St. 250.

[122] Richelieu etc. Co. v. Thames & Mersey M. Ins. Co., 58 Mich. 132.

[123] Dixon v. Whitworth, 4 L. R. Com. P. Div. 371; 48 L. J. Com. P. Div. 538; reversed on another point, 49 L. J. Com. P. Div. 408; 43 L. T., N. S., 365.

[124] Hobbs v. Hannam, 3 Camp. 93; Murdock v. Franklin Ins. Co., 33 W. Va. 407; 10 S. E. Rep. 777; 7 L. R. Annot. 572; Bartlett v. Walter, 13 Mass. 267; 7 Am. Dec. 143; Warder v. Horton, 4 Binn. (Pa.) 529; Oliver v. Greene, 3 Mass. 133.

[125] Bartlett v. Walter, 13 Mass. 267; 7 Am. Dec. 143.

[126] The Gulnare, 42 Fed. Rep. 861.

wheat purchased to be delivered on board ship. Thus, where a part is delivered from time to time, they have an insurable interest in such part as is delivered; for a delivery to the master is a delivery to the purchasers.[127]

§ **1007. Vendor and Vendee in Ship and Freight.**—The vendee of a ship who has paid part of the purchase money has an insurable interest therein, even though she is to remain in the vendor's possession,[128] and the owner who in such case has contracted to convey the title upon full payment has an insurable interest to the full value of the vessel, regardless of the price contracted to be paid for her.[129] So one has an insurable interest in the freight where he has a builder's bond for the conveyance of the ship, upon payment of the balance of the contract price for her building, he having possession thereof, and he may insure as owner even though she is registered in the builder's name.[130] And an assignor has an insurable interest where he reserves his right to freight earned, if it appears that it was intended to cover his interest.[131]

§ **1008. What Interest of Shipowner in Freight Includes.**—In what appears to be the earliest case in which the word "freight" occurs, it is evidently used to mean the cargo carried.[132] Emerigon defines freight as a salary paid, or promised to be paid, the captain on condition that he will transport merchandise or passengers to the place named,[133] and Chancellor Kent says it may include the money paid for transportation of passengers on ships.[134] Although, strictly speaking, the term "freight" refers almost exclusively to the com-

[127] Colonial Ins. Co. v. Adelaide Marine Ins. Co., L. R. 12 App. C. 128; 35 Week. Rep. 636; 56 L. T., N. S., 173.

[128] Kenney v. Clarkson, 1 Johns. (N. Y.) 385; Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 256.

[129] Stuart v. Columbian Ins. Co., 2 Cranch (C. C.), 442.

[130] Simenes v. Marine Ins. Co. etc., 2 Cranch (C. C.), 618.

[131] Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

[132] Bright v. Cowher, 1 Brown. & Gold. 21. See, also, Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 145, per Shaw, C. J.

[133] Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 8, p. 178.

[134] 3 Kent's Commentaries, ed. *219.

pensation for carriage of goods,[135] nevertheless, in its most comprehensive meaning, freight, as used in insurance law, imports the benefit derived by the shipowner from the employment of his ship,[136] whether such benefit be the price paid the shipowner as charter money under a contract of affreightment for the hire of the ship or a part thereof, as in case of a part owner for a certain time or a certain voyage,[137] or money paid by one or various persons who put specific quantities of goods on board for transportation,[138] or the benefit be merely derived through the increased value in part of the shipowner's own goods, by reason of carrying them in his own ship.[139] As will be seen from what has been stated, there is an important distinction between freight and charter freight, the former being the compensation for the carriage of goods in the ship, the latter being the price paid the owner as charter money under a contract of affreightment, whether for the ship or a part thereof, as in case of a part owner, for a certain time or a certain voyage. Under the latter, the ship may earn freight, though no goods are ever put on board or be contracted for, or in some cases, even though they are not ready to be shipped, the interest to be insured under such a policy is the freight which would have been earned under the charter-party if the voyage had not been stopped by the intervention of a peril in-

[135] Examine Griggs v. Austin, 3 Pick. (Mass.) 19; Pitman v. Hooper, 3 Sum. (C. C.) 50, 56.

[136] Examine Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Scott v. Libby, 4 Dall. (U. S.) 439; 2 Johns. (N. Y.) 336; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289; Flint v. Flemyng, 1 Barn. & Adol. 48, per Lord Tenterden; 3 Kent's Commentaries, *219.

[137] Hobbs v. Hannam, 3 Cowp. 93; Riley v. Hartford Ins. Co., 2 Conn. 373; Forbes v. Aspinwall, 13 East, 324, per Lord Ellenborough; Winter v. Halliday, 2 Barn. & Adol. 659; Flint v. Flemyng, 1 Barn. & Adol. 48, per Lord Tenterden; Etches v. Aldan, 1 Man. & R. 157; Winter v. Haldimand, 3 Barn. & Adol. 649, per Lord Tenterden; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 145; Beames' Lex Mercatoria, 118; Riley v. Delafield, 7 Johns. (N. Y.) 522; Deering's Annot. Civ. Code Cal., sec. 2661.

[138] Riley v. Hartford Ins. Co., 2 Conn. 373.

[139] Flint v. Flemyng, 1 Barn & Adol. 48, per Lord Tenterden; 8 L. J. K. B. 350; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 146; Paradise v. Sun Ins. Co., 6 La. Ann. 596; Devaux v. Janson, 2 Bing. N. C. 519; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429.

sured against.[140] The main point in both cases is, that the insured must have an inchoate right to freight to sustain an insurable interest, and this inchoate right, as a general rule, accrues in the former case at once the goods are on board the ship, or where, the ship being in a condition to receive them, they are contracted for and in a situation to be put on board; and in the latter case, at once the ship has broken ground for the purposes of the charter-party.[141] The shipowner who insures the freight of his own cargo is, however, entitled only to the usual rate of freight at the port of departure which he might have obtained from others in the ordinary course of business for like goods, and he is not entitled to the enhanced value given by transportation.[142] Freight should not in any case be confounded with the profits on the cargo at the port of destination.[143] Freight may have been partially or wholly paid in advance, in which case, if the goods are not carried by reason of any event for which the shipper is not responsible, and there is no agreement to the contrary, it is to be repaid.[144]

§ **1009. Requisites of an Interest in Freight.**—A person must have some interest in freight, otherwise he cannot insure it.[145] An interest in freight is an inchoate right to it, proceeding from or dependent upon the right of ownership, upon some legal or equitable title in the ship existing at least at the time of loss, and such right in expected freightage must be such that the freight would certainly have been earned but for the intervention of the peril insured against.[146] Where

[140] See Davidson v. Willasey, 1 Maule & S. 315, per Lord Ellenborough; Riley v. Hartford Ins. Co., 2 Conn. 368, per Hosmer, J.

[141] McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 409; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163.

[142] Paradise v. Sun Ins. Co., 6 La. Ann. 596.

[143] Paradise v. Sun Ins. Co., 6 La. Ann. 596.

[144] Pitman v. Hooper, 3 Sum. (C. C.) 50, 56; Watson v. Duykinck, 3 Johns. (N. Y.) 335. See Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 8, p. 179.

[145] Atwell v. Miller, 11 Md. 34; 69 Am. Dec. 206.

[146] Adams v. Warren Ins. Co., 22 Pick (Mass.) 163, per Shaw, C. J.; Camden v. Anderson, 5 Term Rep. 709, per Lord Kenyon and Ashhurst, J.; s. c. 6 S. Rep. 723; Foley v. United F. & M. Ins. Co. of Sydney, L. R. 5 Com. P. 155; Thompson v. Taylor, 6 Term Rep. 478; Merch

one produced a bill of sale to himself and another, the register being to both, it was held that he was only entitled to recover a moiety, and not the whole, of the freight under a policy thereon.[147] And in an English case it is held that the register is decisive evidence of ownership, and that where four persons purchased a ship, and it was registered only in the names of two of them, that the four had not an insurable interest in the freight, as they had neither a legal nor equitable title to the ship, there being no averment of interest in the two in whose names the ship was registered.[148] The register is now, however, only prima facie evidence in England.[149] Freight is insurable without reference to the profits, and it being insured under a valued policy, and if the intervention of the perils insured against prevents the delivery of the cargo, the assured may recover the valuation in the policy without reference to the profits or even the amount of expected compensation due had the cargo been delivered. The contract having fixed the valuation, and there being no fraud, such valuation governs in case the assured is unable to earn his freight.[150] Since a peril for part of the voyage may be greater than that for the other part, a freight voyage may be insured for part of the way.[151] That freight for a part of the voyage may be insured is settled,[152] notwithstanding a nisi prius decision of Lord Kenyon to the contrary, and which was based upon the ground that the risk was not that which the underwriter had

v. Philadelphia Ins. Co., 3 Whart. (Pa.) 473; Hickie v. Rodocanachi, 28 L. J. Ex. 273; 4 Hurl. & N. 455; Miller v. Woodfall, 8 El. & B. 493; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Marsh v. Robinson, 4 Esp. 98; Gordon v. American Ins. Co. of New York, 4 Denio (N. Y.), 362; Cal. Civ. Code,. sec. 2662; McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J. See section 897, ante.

[147] Ohl v. Eagle Ins. Co., 4 Mass. 172.

[148] Camden v. Anderson, 5 Term Rep. 709, under Act 26 George III., c. 60.

[149] Merchants' Shipping Act, 1854.

[150] Lockwood v. Atlantic etc. Ins. Co., 47 Mo. 50.

[151] Taylor v. Wilson, 15 East, 324.

[152] Taylor v. Wilson, 15 East, 324; Michael v. Gillespie, 26 L. J. Com. P. 306; 12 Com. B., N. S., 627; Gordon v. American Ins. Co. of N. Y., 4 Denio (N. Y.), 360; Hall v. Brown, 2 Dowl. Pr. C. 367.

agreed to assume, since the freight insured, being only for a part of the voyage, differed from the freight as payable.[153]

§ **1010. Shipowner in Freight.**—It is well settled that a right of the shipowner to freight is an insurable interest, and freight a lawful subject of insurance. It is a substantial interest based upon a right which the loss of the subject matter out of which it proceeds, or to which it attaches, would materially affect, and prevent from becoming perfect. This right being of pecuniary value, the intervention of the peril insured against necessitates a pecuniary loss.[154] It is requisite, however, in all cases that the interest or risk should have attached.[155] And an exception also exists in certain cases where freight has been paid absolutely in advance, and cannot be recovered back in case of nondelivery. Where a ship sails under a charter-party, her owners have an insurable interest in freight, and may recover the whole sum valued.[156] If the shipowner charters his vessel, and the charterer covenants to pay a certain sum or her full value to the owner in case the ship is lost, the owner has an insurable interest, since he is not bound to trust exclusively to the credit of the charterer;[157] for a contract of affreightment gives the shipowner an interest in freight.[158] So, also, where there is a charter-party for a complete cargo, freight to be paid at a certain rate, an interest is created.[159]

[153] Murdock v. Potts, reported in 1 Marshall on Insurance, ed. 1810, *326; 2 Park on Insurance, 8th ed., 634.

[154] See Lucena v. Crawford, 3 Bos. & P. 102, per Chambre, J.; Clark

[155] De Vaux v. Janson, 5 Bing. (N. C.) 537; McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 405, per Shaw, C. J.; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163.

[156] De Vaux v. Janson, 5 Bing. N. C. 537; McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J.; Barber v. Flemyng, L. R. 5 Q. B. 59; Melcher v. Ocean Ins. Co., 60 Me. 77; Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 146; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Merc. S. Co. v. Lysen, L. R. 7 Q. B. D. 75.

[157] Hodgson v. Mississippi Ins. Co., 2 La. (O. S.) 341.

[158] Hobbs v. Hannam, 3 Camp. 93.

[159] Barber v. Flemyng, 5 L. J. Q. B. 59.

[159] Moses v. Pratt, 4 Camp. 297.

§ **1011. Charterer who is Part Owner.**—If the charterer is himself the owner of one moiety of the vessel, and hires the other moiety of its owner for a specified time at a certain sum per month, and, if she is lost, to pay a specified sum for the half part of the vessel, which does not exceed the value of such part, such charterer has immediately on the execution of the contract a special property in the chartered moiety, which gives him an insurable interest; nor need he specify the nature of his interest, and the policy being upon the whole vessel, and covering both the absolute and special ownerships, a recovery may be had.[160]

§ **1012. Charterer in Expected Freight.**—As we have stated, the right to freight results from the right of ownership, and necessitates some title in or to the ship.[161] If a charterer who has contracted to pay a certain sum for the hire of the ship, or of any certain portion of the tonnage to the owner, employs it, there being nothing in the agreement to the contrary, as a freighting ship for the transportation of other's goods on freight, he stands as owner pro haec vice, in relation to the shippers of the goods. He assumes, with respect to such property and the right to the freight, the perils of the seas, the same as the shipowner under such carriage, especially where the expected freight exceeds the charter money, and he has an insurable interest certainly to the extent of the surplus. This rule and qualification, however, must be understood as meaning that the charterer has an insurable interest, in such case, in freight to be earned to the full extent of his interest therein, as governed by the principles of indemnity which underlie the contract of insurance, since indemnity must control the amount of recovery.[162] And there would seem to be no valid reason why, subject to the foregoing rule, the charterer may not, the same as the shipowner, insure the freight or benefit to be de-

[160] Oliver v. Greene, 3 Mass. 133; Taylor v. Wilson, 15 East, 324.

[161] Camden v. Anderson, 5 Term Rep., per Lord Kenyon. See sec. 1004, herein.

[162] See Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 294, per Putnam, J.; Mistaer v. Gillespie, 11 Ves. 69; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 146.

rived from the carriage of his own goods to the same extent as in case of carriage of goods of others.[163] It is held that a charterer, who hires a ship for the outward passage and return, and employs her in carrying a cargo out for which he is to receive freight at the outport, has an insurable interest to the amount of the expected freight, notwithstanding the fact that the ship being lost nothing was due from him to the shipowner.[164] And where the vessel was hired for a certain sum for a voyage outward and return, the charterers agreeing to insure the freight to the amount of the charter money, and it was done, and she was lost, it was held that they could maintain an action in their own names.[165] It is held, however, in a New York case that where the charter money exceeds the amount of freight to be earned, that the charterer has no insurable interest in the freight;[166] and in another case in the same state, in which there was no surplus over the charter money, it was held that the liability of the charterer to pay being dependent upon the safe arrival of the ship, or the performance of the voyage, the liability would cease upon loss or failure to perform, and therefore he could have no interest in freight to be earned by his carrying cargo.[167] It is also held that the charterer, whose obligation to pay freight does not become absolute until the termination of the voyage, has no insurable interest in freight.[168] In this connection it may be stated that the charter money may be payable absolutely or only in case of the safe arrival of the vessel, or the performance of the voyage, and that the freight receivable by the charterer may be less than the charter money or may exceed it.

§ 1013. Charterer and Shipowner—Separate Risks — A charterer who assumes certain risks and the owner other

[163] See Oliver v. Greene, 3 Mass. 133; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289; Bartlett v. Walter, 13 Mass. 267.

[164] Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 294.

[165] Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73.

[166] Huth v. New York M. Ins. Co., 8 Bosw. (N. Y.) 538.

[167] Mellen v. National Ins. Co., 1 Hall (N. Y.), 500. See Watson v. Duykinck, 3 Johns. (N. Y.) 336.

[168] Robbins v. New York Ins. Co., 1 Hall (N. Y.), 363.

risks has an insurable interest in freight to the full extent against the perils assumed by them; so has the owner.[169]

§ 1014. Charterer Insuring Against Special Peril.—Where the charterer has bound himself to pay a certain sum on the arrival of the ship on her return voyage, in case she should not be permitted to discharge her outward or load her return cargo, and she is refused permission to discharge the same at the outport, and the charterer immediately proceeds to another port and disposes of the cargo, and takes another for the time past and earns freight, it is held that his liability to pay the shipowner the agreed-upon sum gives him an insurable interest, but that the insurer is entitled to the credit of the sum received for freight, the policy being a contract to pay the charterer a total loss in case he is not permitted to load at the outward port.[170]

§ 1015. Advances by Charterer on Freight.—If the advancement by the charterer be in part payment of freight, he has an insurable interest in the money so advanced.[171] And

[169] Sanson v. Ball, 4 Dall. (U. S.) 459; Clark v Ocean Ins. Co., 16 Pick. (Mass.) 289.

[170] Puller v. Stainforth, 11 East, 232. But credit for new freight earned was not allowed in Puller v. Halliday, 12 East, 494. See, also, as to credit for freight earned in case of shipowner, Insurance Co. v. Mordecal, 22 How. (U. S.) 111; Davy v. Hallett, 3 Caines (N. Y.), 16.

[171] "If the memorandum of charter-party had in this instance clearly expressed that the money advanced should be in part payment of the freight, then it would follow that the loss of the ship would produce a loss of the money advanced to the freighter, and he would have an insurable interest in it": Manfield v. Maitland, 4 Barn. & Ald. 585, per Bayley, J. In this case it appeared that the memorandum for charter stated one-half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months date, and also provided, after containing stipulations for unloading, discharging, demurrage, etc.: "The captain to be supplied with cash for ship's use," in pursuance of which latter stipulation the master drew a bill on the freighters, which was duly accepted and paid, and it was held that this was not to be considered as a payment of freight in advance, but a loan to the owner of the ship, and that the freighters (the ship being lost on her homeward voyage) had no insurable interest in the bill: Landers v. Drew, 3

it is held that advances for freight may be insured as freight; but there must be a proof of actual advances to warrant a recovery.[172] But the contrary is held in Louisiana,[173] although, where there was no denial that freight had been paid in advance, it was held that the insured was not bound to prove that he had paid it.[174] Freight so paid in advance is a lawful subject of insurance, and is liable to an average loss,[175] and it is held that the insurer cannot avoid liability on the ground that advanced freight might be recovered back by reason of the loss of the cargo.[176] So the insured under a policy on such freight may recover an average loss arising from the payment of salvage.[177] So one who advances money to a shipowner, in consideration of a right to fill up a certain proportion of the ship's tonnage with goods of his own or others, has an insurable interest which he may describe as "freight advanced," and valued by agreement at a certain sum.[178] And if the freight advanced is received on account of the charter-party as a portion of the entire sum payable, and the whole still remains at risk, and the charter-party is annulled, the money being considered as part payment under a new charter-party, the charterer has such an

Barn. & Adol. 445; Anonymous, 2 Show. 283; Griggs v. Austin, 3 Pick. (Mass.) 20; De Silvale v. Kendall, 4 Maule & S. 37.

[172] Robbins v. New York Ins. Co., 1 Hall (N. Y.), 563. The court in this case, per Jones, C. J., said: "But a part of the freight is said to have been advanced. The advance of the freight gives no right to insure beyond the amount of the advance, and where the owner of the vessel is liable to refund in case of loss his right to insure that amount—resulting from the lien the charterer has upon the freight for his security—requires that proof should be made of the actual payment of the money alleged to be advanced. . . . . The actual proof of the advance cannot be dispensed with as proof in chief on the trial": See, also, Sansom v. Ball, 4 Dall. (U. S.) 459; Manfield v. Maitland, 4 Barn. & Ald. 588, per Abbott, C. J.; Mellen v. National Ins. Co., 1 Hall (N. Y.), 500; Winter v. Haldimand, 3 Barn. & Adol. 649.

[173] Kathman v. General Mut. Ins. Co., 12 La. Ann. 35.

[174] Kathman v. General Mut. Ins. Co., 12 La. Ann. 35.

[175] Sansom v. Ball, 4 Dall. (U. S.) 459; Kathman v. General Mut. Ins. Co., 12 La. Ann. 35.

[176] Kathman v. General Mut. Ins. Co., 12 La. Ann. 35.

[177] Sansom v. Ball, 4 Dall. (U. S.) 459.

[178] Sansom v. Ball, 4 Dall. (U. S.) 459.

insurable interest.[179] Again, where the charterer agrees to pay a sum absolutely, part being paid at the outport for port charges and incidental expenses and the balance on arrival, it is held that he had an insurable interest in the payment so made at the outport, but it must be described specifically, and is not covered by the general designation of freight.[180] And where the insurance was on freight prepaid on account, and the master was justified in abandoning the voyage, and the insured procured the goods to be carried at a rate of freight in excess of that payable under the charter-party, a recovery as for a total loss of the freight so advanced was adjudged.[181]

§ **1016. When Charterer has no Insurable Interest in Freight Advanced.**—If the charterer advances money on freight on the owner's personal credit alone, and the latter is obligated, irrespective of the issue of the voyage, to repay the same as a debt, the charterer runs no risk of losing it by the perils insured against, and therefore has no insurable interest in freight so advanced.[182] And one who loans money to the master to be repaid out of the freight has no insurable interest,[183] unless the freight be assigned or pledged as security, and the principal rule should also be subject to the exception that by the terms of the charter-party a lien may be stipulated for by virtue of which an insurable interest would exist. Mr. Arnould says that if by the terms of the charter-party it does not clearly appear that the money advanced is part payment specifically of freight, it will be regarded as a mere loan.[184] If it appears by

[179] Ellis v. Lafone, 8 Ex. 546; 22 L. J. Ex. 124.

[180] Winter v. Haldimand, 3 Barn. & Adol. 649, per Lord Tenterden.

[181] De Cadra v. Swain, 16 Com. B., N. S., 772. For a fuller discussion of this question of advances on freight, see Hicks v. Shield, 7 El. & B. 633; Manfield v. Maitland, 4 Barn. & Ald. 582; Allison v. Bristol M. Ins. Co., 1 App. Cas. 209; Wilson v. Martin, 11 Ex. 684; De Silvale v. Kendal, 4 Maule & S. 37; Williams v. North China Ins. Co., 35 L. T., N. S., 884.

[182] Lee v. Barreda, 16 Md. 190; Minturn v. Warren Ins. Co., 2 Allen (Mass.), 86; Manfield v. Maitland, 4 Barn. & Ald. 582.

[183] Wilson v. Royal Exchange Assur. Co., 2 Camp. 623.

[184] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 266, 267. *260, *261; citing Manfield v. Maitland, 4 Barn. & Ald. 585, per Abbott, C. J.; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 293, 294; Sansom v.

the bill of lading that freight would not be earned except in case of carriage and delivery at the port of destination, and that the insured has a right to recover back the freight advanced in case the carrier fails to deliver according to the bill of lading for any cause not imputable to the insured, the money advanced gives no insurable interest to freight, being in the nature of a conditional loan.[185]

§ 1017. Owner in Case of Bottomry or Respondentia. If a vessel is under bottomry it is held to operate as a sale pro tanto of the owner's interest,[186] yet a bottomry bond made by the master only gives an enforceable claim against the vessel hypothecated, and vests no absolute, indefeasible interest in the ship.[187] And so far as the owner has an insurable interest in his ship hypothecated by bottomry, he may insure his interest generally. But the borrower cannot insure the amount advanced, for he does not assume the risk. This arises from the very nature of the contract,[188] inasmuch as it is of the very es-

Ball, 4 Dall. (U. S.) 459. See Griggs v. Austin, 3 Pick. (Mass.) 20; Brown v. Harris, 3 Gray (Mass.), 59.

[185] Minturn v. Warren Ins. Co., 2 Allen (Mass.), 86; Pitman v. Hooper, 3 Sum. (C. C.) 50, 66; Griggs v. Austin, 3 Pick. (Mass.) 20; Phelps v. Williamson, 5 Sand. (N. Y.) 578; Brown v. Harris, 3 Gray (Mass.), 59; Benner v. Equitable Ins. Co., 6 Allen (Mass.), 222; Watson v. Duykinck, 3 Johns. (N. Y.) 335; Masterter v. Buller, 1 Camp. 84, per Lord Ellenborough; Chase v. Alliance Ins. Co., 9 Allen (Mass.), 314. As to the English rule of right to recover back prepaid freight, see De Silvale v. Kendall, 4 Maule & S. 37; Byrne v. Schiller, L. R. 6 Ex. 20, 320.

[186] Read v. Mutual Safety Ins. Co., 3 Sand. (N. Y.) 54.

[187] The Charles Carter, 4 Cranch (C. C.), 328, per Chase, J.

[188] The French ordonnance prohibited those who took up money on maritime loan to insure it. "Pothier gives his reasons for this prohibition: 1. The risk of the money advanced on maritime loan does not fall on the borrower, but one can effect insurance only on what one runs the risk of losing: 2. If it were allowed to the borrower to effect insurance on the sum received by him as a maritime loan, he would be, in case of loss, discharged from all obligation toward the lender, and would receive, on the part of the insurers, the same sum in the shape of pure gain. Insurance which cannot have other object than indemnity for damage suffered, would here serve to procure him an advantage; this is repugnant to the nature of the contract": Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 11, p. 192; Kenney v. Clarkson, 1 Johns. (N. Y.) 385; 3 Am. Dec. 336.

sence of both bottomry and respondentia that the lender must run the marine risk to be entitled to both the principal and the marine interest, and the debt, in so far as it depends upon the bottomry bond, is lost if the ship be lost by the stipulated perils.[189] It will, therefore, appear that the loss of the vessel will cancel the bottomry obligation, and for this reason the bottomer's interest for which he would be entitled to indemnity would only be the excess of the value of the vessel or goods over the bottomry debt.[190] But he cannot insure this surplus as bottomry for the reasons above stated.[191] There is no doubt but that this rule is subject to such qualifications as may arise under an agreement that the lender shall assume only sea risks, or those of capture, in which case the borrower may insure to the full value of his interest as to other risks.[192] The above rule is also substantially that provided by the statutes of some of the states.[193] And the statute 19 George II., chapter 37, section 5, provided that on ships engaged in the East India trade, the borrower on bottomry or respondentia should recover no more on any insurance than the value of his interest in the ship or in the goods on board, exclusive of the money so borrowed, and that the money should only be lent on the ship or goods on board with benefit of salvage to the lender; but, as will be observed, the prohibition did not extend to other cases.[194]

[189] Thorndike v. Stone, 11 Pick. (Mass.) 187; Greeley v. Waterhouse, 19 Me. 9; Braynard v. Hoppack, 32 N. Y. 571; 88 Am. Dec. 349; Leland v. The Medna, 2 Wood. & M. (C. C.) 92. See Pope v. Neckerson, 3 Story (C. C.), 465; Jennings v. Insurance Co., 4 Binn. (Pa.) 244; The Draco, 2 Sum. (C. C.) 157; The Mary, 1 Paine (C. C.) 671; Rucher v. Cunningham, 2 Pet. Admr. (U. S.) 295.

[190] Read v. Mutual Safety Ins. Co., 3 Sand. (N. Y.) 54; Watson v. Insurance Co. of North America, 3 Wash. (C. C.) 1; Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 11, pp. 192, 193.

[191] Glover v. Black, 3 Burr. 1394; 7 W. Black. 405.

[192] 1 Phillips on Insurance, 3d ed., sec. 308.

[193] Deering's Annot. Civ. Code Cal., sec. 2660.

[194] And the statute, 7 George 1, chapter 21, prohibited lending money on bottomry of foreign East India ship; and see Sumner v. Green, 1 H. Black. 301, where it was held that where a British subject loaned money under a respondentia bond upon goods on board an American ship, on a voyage from Bengal to an American port, the bond was void, and the question was raised whether the American ship was a foreign ship within the intent of the statute.

So the owner of a ship bottomed for more than half her value has no insurable interest.[195]

§ **1018. Lender in Bottomry or Respondentia.**—A bottomry bond is a contract by which the owner or master of a ship binds her by direct hypothecation as security for repairs or supplies made or furnished in a foreign port, or for money advanced for the use of the ship. It is a contract in the nature of a mortgage of the ship;[196] but the advances must have been necessary to effect the objects of the voyage or the safety of the ship,[197] although it is held that the owner may hypothecate his ship in a foreign port for money to buy a cargo.[198] And in respondentia loans it is not necessary that the money loaned should be expended in fitting out the ship or invested in the goods on which the risk is run.[199] These loans are a species of insurance, and a higher rate of interest, called "marine interest," is charged, and are upon maritime risks, to be borne by the lender for a voyage or a definite period. So far as the debt depends upon the bottomry bond, it is lost if the ship be lost by the stipulated perils.[200] And, as we have stated in the preceding section, it is of the very essence of these contracts that the lender runs the marine risk to entitle him to the

[195] Williams v. Smith, 2 Caines Cas. (N. Y.) 110; reversing 1 Caines (N. Y.), 19.

[196] The Hilarity, Blatchf. & H. Adm. 90; Braynard v. Hoppock, 32 N. Y. 571; 88 Am. Dec. 349; The Draco, 2 Sum. (C. C.) 157; Botton v. The James L. Pendergast, 30 Fed. Rep. 717; Emerigon on Insurance, Meredith's ed. 1850, c. vii, sec. 11, p. 192, et seq.

[197] The John & Alice, 1 Wash. (C. C.) 293; Putnam v. The Polly, Bee Adm. 157; The Mary, 1 Paine (C. C.), 671; The Aurora, 1 Wheat. (U. S.) 96; Patton v. The Randolph, Gilp. (C. C.) 457; Walden v. Chamberlain, 3 Wash. (C. C.) 290.

[198] The Mary, 1 Paine (C. C.), 671. See The Draco, 2 Sum. (C. C.) 157.

[199] Conrad v. Atlantic Ins. Co., 1 Pet. (U. S.) 437; United States v. Delaware Ins. Co., 4 Wash. (C. C.) 418.

[200] The Draco, 2 Sum. (C. C.) 157. See Pope v. Nickerson, 3 Story (C. C.), 465; Braynard v. Hoppock, 32 N. Y. 571; 88 Am. Dec. 349; Insurance Co. v. Gossler, 6 Otto (96 U. S.), 645; Appleton v. Crowninshield, 8 Mass. 340; 3 Mass. 443. As to rule in case of partial loss, see Insurance Co. v. Gossler, 6 Otto (96 U. S.), 645; Pope v. Nickerson, 3 Story (C. C.), 487.

principal and marine interest. A respondentia bond is a mere personal contract, and does not pass the right of property in the goods.[201] Bottomry bonds hypothecate the vessel and freight; respondentia bonds, the cargo, although a bottomry and respondentia bond may be given to cover the ship and cargo, and bottomry bonds are also given on the ship and cargo.[202] But it is held that where the ship and cargo are covered by bottomry, and are owned by different persons, the cargo is only secondarily liable.[203] It will be seen, therefore, that the lender's capital is put at risk, and in case of both bottomry and respondentia loans he has an interest in the arrival of the ship or goods, for upon safe arrival the principal and stipulated interest are to be repaid.[204] He may, therefore, effect insurance upon his capital to the extent of the obligation, assuming in all cases that the bond be valid.[205] If the bond is upon a vessel and freight earnings to secure money advanced thereon, and the contract provides that neither the owner nor master shall procure other advances upon the same at the port of lading except they return the lender the money advanced under the first bond, the fact that a subsequent loan is obtained without such lender's consent does not impair the insurable interest of the first lender under his bond, and it is held that

[201] United States v. Delaware Ins. Co., 4 Wash. (C. C.) 418.

[202] See the Atlas, 2 Hagg. Adm. 48, 53; Welsh v. Cabot, 39 Pa. St. 342; Miller v. O'Brien, 35 Fed. Rep. 779; The Gratitude, 3 Rob. Adm. 240; Insurance Co. v. Gossler, 96 U. S. (6 Otto) 645.

[203] Welsh v. Cabot, 39 Pa. St. 342. Examine The Julia Blake, 16 Blatchf. (C. C.) 472; La Constancia, 4 Notes of Cases, 285.

[204] See Insurance Co. etc. v. Duval, 8 Serg. & R. (Pa.) 138. Under the form of respondentia bonds in that case, it is held that payment of the debt and marine interest depends upon the safe return of the goods, and not of the ship.

[205] Harman v. Vanhatton, 2 Vern. 117; The Virgin, 8 Pet. (U. S.) 538; Glover v. Black, 1 Wm. Black. 396; Simmonds v. Hodgson, 3 Barn. & Adol. 50; reversing 6 Bing. 114; Williams v. Smith, 2 Caines Cas. (N. Y.) 110; 1 Caines (N. Y.) 19; Emerigon on Insurance, Meredith's ed. 1850, c. viii. sec. 11, p. 193, et seq. This author says: "It is a species of reinsurance to which the lender has recourse to remove from himself to a third party the maritime risk for which he is bound toward the borrower": Id. 194; Jennings v. Insurance Co., 4 Binn. (Pa.) 244; Insurance Co. v. Baring, 20 Wall. (U. S.) 159; Kenney v. Clarkson, 1 Johns. (N. Y.) 385. See Stainbank v. Fenning, 11 Com. B. 57; 13 Com. B. 418.

he may proceed against the owner, master, or insurer as he may elect.[206] But the lender has no insurable interest where the hypothecation does not depend upon the arrival of the ship, the money being made payable at all events, and all the risk being taken by the master and owner;[207] for a loan is not a bottomry loan where collateral security is given for its absolute repayment.[208] So where money loaned to the master is to be repaid out of the freight, the lender has no insurable interest,[209] for, as we have already stated, the lender's principal and interest must be at risk. The holder of a bottomry bond must insure eo nomine.[210] So an insurance on a vessel will not cover the bottomry interest unless it is expressly mentioned in the policy.[211]

§ 1019. Expected Profits.—It is well settled that expected profits are insurable, whether they be on a cargo or other property at risk.[212] And in marine risks the insured may recover a total or an average loss, according as the loss of the goods is total or partial;[213] for a merchant may protect those advantages he is in danger of losing by certain perils, as well as his capital employed in maritime adventures. If in marine insurance the goods do not arrive, the loss is not merely of them, but of the benefits which might be derived were the money employed in undertakings not subject to perils of the seas.[214] While an interest in the vessel and cargo gives an in-

[206] Cassa Marittima v. Phœnix Ins. Co., 129 N. Y. 490; 42 N. Y. St. Rep. 258; 29 N. E. Rep. 962.

[207] Stainbank v. Sheppard, 13 Com. B. 418; affirming s. c., 11 Com B. 51.

[208] Braynard v. Hoppock, 32 N. Y. 571.

[209] Wilson v. Royal Exch. Assur. Co., 2 Camp. 623.

[210] Kenney v. Clarkson, 1 Johns. (N. Y.) 385; 3 Am. Dec. 336.

[211] Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250; 1 Am. Dec. 166.

[212] Barclay v. Cousins, 2 East, 544; Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 451; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36.

[213] Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39; 2 Am. Dec. 139; Grant v. Parkinson, 3 Bos. & P. 85, n.; 3 Doug. 16; 6 Term Rep. 483, n.; Putnam v. Mercantile Ins. Co. 5 Met. (Mass.) 391; Tom v. Smith, 3 Caines (N. Y.), 245; Patapsco Ins. Co. v. Coulter, 2 Pet. (U. S.) 222; Hendrickson v. Margetson, 2 East, 549, n.

[214] Barclay v. Cousins, 2 East, 544, per Lawrence, J. See Lucena v. Crawford, 3 Bos. & P. 75; Grant v. Parkinson, 3 Bos. & P. 85, n.; 3

terest in the profits of the voyage, which may be insured,[215] yet it is necessary that the insured must have an interest and subsisting title in the goods, from which the profits are expected to be realized;[216] although this need not be an absolute property in order to insure under a valued policy, as where one purchases a right to take a part of the cargo should it arrive at a certain port, such right being based upon a valuable consideration then paid.[217] So one who has contracted to buy a certain quantity of rice to arrive at a specified port, and has contracted in advance for its sale, has an insurable interest.[218] But in case of a stoppage in transitu, it might preclude the election.[219] The goods must also have been actually exposed to the perils of the sea at least some time before loss to warrant a recovery on profits;[220] and profits must be insured eo nomine.[221] So a policy on "goods" is held not to cover a policy on "profits,"[222] but may be insured under an open or valued policy.[223] If the

Doug. 16; 6 Term Rep. 483, n.; cited in 1 Marshall on Insurance, ed. 1810, 97.

[215] Fosdick v. Norwich Ins. Co., 3 Day (Conn.), 108.

[216] Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39; McSwiney v. Royal Exch. Assur. Co., 14 Q. B. 634; overruling s. c., 18 L. J. Q. B. 193.

[217] French v. Hope Ins. Co., 16 Pick. (Mass.) 397, 400; Locke v. North America Ins. Co., 13 Mass. 61. But see Stockdale v. Dunlop, 6 Mees. & W. 224.

[218] McSwiney v. Royal Exch. Assur. Co., 18 L. J. Q. B. 193; 14 Q. B. 634.

[219] See Clay v. Harrison, 10 Barn. & C. 99.

[220] Knox v. Wood, 1 Camp. 543.

[221] Elmaker v. Franklin Ins. Co., 5 Pa. St. 183; Sun Fire Office v. Wright, 3 Nott & McC. 819; Niblo v. North America Ins. Co., 1 Sand. (N. Y.) 551; Leonards v. Phœnix Ins. Co., 2 Rob. (La.) 131. See sec. 2030, herein.

[222] Stock v. Inglis, 9 L. R. Q. B. Div. 708; 52 L. J. Q. B. Div. 30.

[223] "In a valued policy on goods the expected profit may be included, the assured not being restricted in the valuation to the invoice price. This is in effect an insurance on profit, and what may be insured jointly with something else may be insured by a separate policy. The circumstance of the policy in this case being open does not seem to me to make any further difference than to throw upon the assured the burthen of showing the amount of the profit they would have made had the goods arrived. Certum est, quod certum reddi potest." But see Mumford v. Hallett, 1 Johns. (N. Y.) 433, where the court, per Livingston, J., declares that "though the profits are not valued, yet every such insurance must be considered as a valued, and not an open, policy; especially if the goods themselves are valued.

insured sell the goods, he cannot recover for profits insured;[224] for the interest in the profits must, as in all other cases in marine and fire risks, exist in the assured at the time of loss to warrant his being indemnified.[225] In an English case the policy was upon a cargo of slaves on the profits valued, and in case of loss no proof of interest required other than the policy. The ship being lost with a part of the slaves, those saved were sold, but at no profit on the adventure, and it was held that no recovery could be had in the absence of proof that there would have been some profit had all the cargo been in market.[226] And this accords with the rule stated by Mr. Marshall, based upon English cases,[227] although it is said in certain New York cases that insurances on profits are in substance, if not in form, a species of valued policy, especially if the goods are valued.[228] It is also held in the same state that proof need not be given that there would have been an actual profit had the goods arrived,[229] and the same rule obtains in other jurisdictions of high authority here, and is undoubtedly the rule in this country.[230] One may insure profits in the future, as in case of a crop not sown; the contract in such case actually attaches in futuro.[231] And the policy in suit is valid although the

If it were otherwise, it would be next to impossible to prove their value, as is done in regard to vessels and cargoes. In these cases it is easy to show what the different subjects cost, but how are you to ascertain what is often imaginary and must depend on so many contingencies."

[224] Tom v. Smith, 3 Caines (N. Y.), 245.

[225] Stockdale v. Dunlop, 6 Mees. & W. 224.

[226] Hodgson v. Glover, 6 East, 316.

[227] 1 Marshall on Insurance, ed. 1810, *102. See, also, Grant v. Parkinson, 3 Bos. & P. 85, n.; 3 Doug. 16; 6 Term Rep. 483, n.; Eyre v. Glover, 16 East, 218; Hendrickson v. Margetson, 2 East, 549; McSwiney v. Royal Exch. Assur. Co., 14 Q. B. 634; overruling L. J. Q. B. 193; Chope v. Reynolds, 5 Com. B., N. S., 642.

[228] Tom v. Smith, 3 Caines (N. Y.), 245; Mumford v. Hallett, 1 Johns. (N. Y.) 433.

[229] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39.

[230] Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, two judges dissenting. See French v. Hope Ins. Co., 16 Pick. (Mass.) 397. But examine Kent's Commentaries, 5th ed., 272.

[231] See Grant v. Parkhurst, 3 Bos. & P. 85, n. As to profits in business, see Sawyer v. Dodge Co. Ins. Co., 37 Wis. 503; citing State ex

crop destroyed is raised by insured on land acquired by him after the date of the policy.[232]

§ 1020. **Profits made and Earned.**—Emerigon says that although expected profits are forbidden by the Ordonnance, yet "when the profit is made and actually earned, the merchant may effect insurance upon it," as where upon arrival of the ship at the outport advices are received that a sale has been made, and the proceeds are of a certain value, that insurance may be effected on the profit arising therefrom; and again, that it does not matter that the profit has been earned in the course of the voyage. Referring to Valin, he also asserts that if a ship is destined to a certain port and thence to another, and the owner is informed of the success of the trade at the first port, and is enabled to judge very nearly of the profit made, he may effect insurance as on a new fund on this augmentation of the original fund of his cargo, since it is a profit already made and earned; that the original cargo is no longer the same, "its value is considerably augmented, and this augmentation, strictly earned to the insured, forms an object distinct from the value of the first fund of the cargo." [233] Mr. Phillips states the rule substantially thus: An additional insurable interest exists in profits made on the outward voyage, which may be covered by a new policy on the homeward cargo, for it has become goods.[234] While the rule in England is that it is necessary to show that some profits would have been made and earned but for the intervention of the perils insured against,[235] yet such is not the rule in the United States.[236]

rel. v. Hastings, 15 Wis. 77, per Cole, J., and Andrew v. Newcomb, 32 N. Y. 417.

[232] Sawyer v. Dodge Co. Ins. Co., 37 Wis. 503.

[233] Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 9, p. 189; c. ix. sec. 7, pp. 226-28.

[234] 2 Phillips on Insurance, 3d ed., 50, sec. 1241; citing McKine v. Phœnix Ins. Co., 2 Wash. (C. C.) 89, etc.

[235] Eyre v. Glover, 16 East, 218; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 209, *206, 239, 245, et seq.; Hodgson v. Glover, 6 East, 316. And see 3 Kent's Commentaries, 5th ed., 272.

[236] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222. In this case Mr. Justice Johnson said:

§ **1021. Passage Money.**—Although passage money is not freight properly so called, yet, so far as an insurable interest is concerned, it comes within the rule that freight is the benefit derived by the shipowner from the employment of his ship, and may be said to be similar to the case of freight paid in advance, and a passenger may have an insurable interest therein, or where an obligation exists on the part of the shipowner to repay the passage money advanced, he may have an insurable interest in passage money, and in England an insurable interest was granted by act 1858.[237] But although it may be denominated "freight," it differs therefrom in many respects with reference to the risk, and it is usual to describe such subject matter as passage money, or to use such terms as will distinguish it from freight of merchandise, for the term "freight" does not include passage money. This was held in a case where the policy was upon freight valued, the cargo being coolies and rice and the valuation was opened and the policy treated as an open policy.[238] Although it is held that insurers of freight may be liable for freight and passage money where the ship chartered to carry cargo and passengers has been prevented by one of the perils insured against from performing her voyage, the vessel having then received part of her cargo, and having shipped water for passengers.[239] If the passage money is paid in advance, the passenger may recover it back if without his own fault he is not carried to the agreed port, and if the ship is lost

"It seems difficult to perceive why, if profit be either a mere excrescence of the principal or identified with it, the loss of the cargo should not carry with it the loss of profits; proof that profits would have arisen on the voyage is not required, in order to recover on a policy on profits, if the cargo has been lost": Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 45; Mumford v. Hallett, 1 Johns. (N. Y.) 333; French v. Hope Ins. Co., 16 Pick. (Mass.) 397. See, also, sec. 1019, herein.

[237] See sec. 1009, ante; 3 Kent's Commentaries, *219; Ogden v. Mutual L. Ins. Co., 35 N. Y. 420; 18 & 19 Vict., c. 119; Amended, 26 & 27 Vict., c. 51.

[238] Denoon v. Home & Colonial Ins. Co., 7 L. R. Com. P. 341; 26 L. T., N. S., 628.

[239] Truscott v. Christie, 2 B. & B. 320; 5 Moore, 331.

the insurer of passage money is liable.[240] Where the insurance was on passage money subject to pay a loss pro rata, and while in a port of distress awaiting repairs on the vessel the insurers maintained the passengers at a cost exceeding the passage money, the insurers were held not liable.[241] Insurers of passage money do not generally undertake for the performance of the voyage within any particular time.[242] Nor at the common law were the owner or master obligated to forward passengers to their destination in case the ship was lost, except in case of actual contract so to do,[243] though it is otherwise by the English act of 1855.[244] Thus, on such insurance generally, if the vessel arrives finally in safety, the insurers are not liable for losses occasioned by delay, even though the passage money may by reason thereof have been obliged to be refunded.[245] And it is held that no passage money is due where the passenger is not carried to the port of destination.[246]

§ **1022. Mariners' Wages.**—Mariner's wages, says Emerigon, are not the subject of insurance, for two reasons: 1. They form a conditional debt, depending on the fate of the voyage. They are gain, which the mariners fail to make if the vessel perishes, rather than a loss which they run the risk of incurring; 2. If wages were insured, mariners being sure of them would not have an interest in the preservation of the vessel.[247] And both usage and authority sanction the rule that seamen may not insure their future wages, nor any compensation or privilege granted to or received by them in lieu of or in the nature of such wages, such insurances being illegal as against the intent

[240] Ogden v. Mutual Ins. Co., 35 N. Y. 418; 8 Bosw. (N. Y.) 248; 4 Bosw. (N. Y.) 447.

[241] Willis v. Cooke, 5 El. & B. 641; 25 L. J. Q. B. 16.

[242] Howard v. Astor etc. Ins. Co., 5 Bosw. (N. Y.) 38.

[243] Gibson v. Bradford, 3 El. & B. 516; 24 L. J. Q. B. 159, per Lord Campbell, C. J.

[244] 18 & 19 Vict., c. 119; Amended 26 & 27 Vict., c. 51.

[245] Howard v. Astor etc. Ins. Co., 5 Bosw. (N. Y.) 38.

[246] The Ship Lavinia, 1 Pet. Adm. (U. S.) 123, 125.

[247] Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 10, p. 191.

of all maritime law.[248] And this includes officers and mates, who are generally known as seamen, and extends in fact, to all officers under the master. Thus, a mate of a vessel who was to receive certain wages, and was also permitted, under a custom existing in England while the slave trade was authorized, to carry a certain number of slaves free of expense as part of his compensation, has no insurable interest in the slaves.[249] But, says Emerigon, if by means of advances or accounts received during the voyage they purchase goods, there is nothing to prevent their insuring these.[250] And such is the rule;[251] nor for the same reasons which prevent such insurances may the mariner benefit himself under a policy effected by the owner.[252] But it is held that he may insure merchandise of his own on board.[253] But the master, however, constitutes an exception, and may insure his commission, privileges, wages, or any interest he may have in the ship, such policy being lawful;[254] but he has no insurable interest in a ship and cargo sold in case of misfortune at a foreign port, unless the purchase be ratified by those interested.[255]

[248] Lucena v. Crawford, 5 Bos. & P. 294; Webster v. De Tastet, 7 Term Rep. 157; The Neptune, 1 Hagg. Adm. 239; Arnott v. Stewart, 5 Dow, 274; The Lady Durham, 3 Hagg. 201; Fornin v. Oswell, 3 Camp. 357; Percival v. Hickey, 18 Johns. (N. Y.) 257; The Juliana, 2 Dod. 509; Icard v. Gould, 11 Johns. (N. Y.) 279, in which the court said: "Insurance on freight, it is well settled by the law, is for the indemnity of the owner only, and does not inure to the benefit of seamen's wages, which cannot be insured either directly or indirectly." As to his right to insure the proceeds of a whaling voyage, see Webster v. De Tastet, 7 Term Rep. 157.

[249] Webster v. De Tastet, 7 Term Rep. 157.

[250] Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 10, p. 191.

[251] Webster v. De Tastet, 7 Term Rep. 157; Galloway v. Morris, 3 Yeates (Pa.), 445. See The Juliana, 2 Dod. 509.

[252] Percival v. Hickey, 18 Johns. (N. Y.) 257, 290, et seq.; Icard v. Gould, 11 Johns. (N. Y.) 279; M'Quirk v. Ship Penelope, 2 Pet. Adm. (U. S.) 276.

[253] Galloway v. Morris, 3 Yeates (Pa.), 445.

[254] Foster v. Hoyt, 2 Johns. Cas. (N. Y.) 327; De Forest v. Fulton Ins. Co., 1 Hall (N. Y.), 94; King v. Glover, 5 Bos. & P. 206. See Barker v. Marine Ins. Co., 2 Mason (C. C.), 372, per Story, J.

[255] Barker v. Marine Ins. Co., 2 Mason, 369; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198. Is there a tendency to relax the rule above stated as to seamen's wages? Mr. Maclachlan (Arnould on

§ **1023. Supercargo.**—If a supercargo is to receive as his compensation a gross sum out of the proceeds of either the whole or a part of the return cargo, at the termination of

Marine Insurance, Maclachlan's ed., 1887, 42-45, 90), gives a section to the discussion whether seamen's wages are now insurable, and says: "I think the right of seamen to insure their wages and effects, and the encouragement of the practice by facilities being offered them for so doing, would improve the character and habits of seafaring men, and would increase the security of the lives and property placed in their power." And that he introduced the section with "the concurrence of some large shipowners in the north of England in the hope of drawing public attention to the subject": Id. 44, n. 5, by editor. Being fully aware of how well settled the rule is which does not permit the insurance of seamen's wages, it is with great hesitation that we offer the following suggestions: Whatever the wisdom of the centuries has decreed, and by usage and custom so firmly established as to become a universal rule of law, cannot be too carefully considered or too profoundly weighed; if it is to be questioned, nevertheless, we cannot forbear suggesting with the utmost deference to the precedents which have established the rule given above, that it is rather the refinement of logic, than the reason and justice of the law, which precludes this class of men from protecting themselves by an insurance of what constitutes in most, if not every, case their all. It is said, speaking of wages, that it is a profit, a gain which seamen may fail to make, rather than a loss which they run the risk of incurring; that it is not a physical object existing on board the ship. But these same reasons are given by the early French writers, as those why an interest in profits, freight to be earned, and interests of the lender in bottomry and respondentia, were not insurable: See Emerigon on Insurance, Meredith's ed. 1850, c. viii, secs. 8-11, pp. 178-96. These interests are nevertheless now declared insurable: See secs. 1009, 1017, 1019. It may be urged that wages are by the law-merchant only earned when freight is earned, or at the most when it might be earned. But the wreck of the ship does not necessarily carry with it the loss of wages earned: 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 42. See, also, on above points, Anonymous, 1 Pet. Adm. (U. S.) 191, n.; The Lady Durham, 3 Hagg. Adm. 196; The Two Catherines, 2 Mason (C. C.), 319; The Neptune, 1 Hagg. Adm. 227; Brackett v. The Hercules, Gilp. (C. C.) 184. Again, seamen have a lien upon the ship and freight for wages earned: See Temple v. Turner, 123 Mass. 328; Allison v. Marsh, 2 Vent. 181; Brown v. Lull, 2 Sum. (C. C.) 443; The Steamer May Queen, Sprague (C. C.), 588; United States v. Wilder, 3 Sum. (C. C.) 308; The Eastern Star, Ware (C. C.), 185. And in certain cases mariners may have an action for breach of contract, the same being entire: Davy v. The Caroline Miller, 36 Fed. Rep. 507; Fee v. Orient Fertilizing Co., 36 Fed. Rep. 509. Or in certain other cases where a discharge is wrongful and unauthorized,

the voyage, he has an insurable interest, and although he may not be entitled to claim compensation from his employers, the

they may be entitled to their wages for the round trip or wages earned: The City of New Orleans, 33 Fed. Rep. 683. See The T. F. Oakes, 36 Fed. Rep. 442; Wilson v. The John Ritson, 35 Fed. Rep. 663. Therefore, wages of seamen have physical existence to this extent, that they constitute a lien upon the ship and freight. Why, then, upon analogy should they not give an insurable interest? They are not a mere expectancy; they are as enforceable as any other lien; they are as tangible as profits or freight to be earned. For a claim for wages attaches from the beginning to something substantial; they may be enforced, as we have stated, under certain circumstances, as wages earned in case of wrongful discharge or breach of contract. Again, it is said that another reason is that mariners being insured would be sure of their wages, and would have less care for the preservation of the vessel in which they would no longer have an interest, and that the object of maritime law is also to prevent desertion of the seamen: Emerigon on Insurance, Meredith's ed. 1850, p. 191; 1 Arnould on Marine Insurance, Perkins' ed., 211. See 2 Duer on Insurance, ed. 1845, 323, sec. 34. But see 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 44, where Mr. Maclachlan says the sole ground upon which the earlier judges proceeded (referring to Lord Stowell, Chief Justice Abbott, and Sir John Nichols in The Neptune Clark, 1 Hagg. 239; Abbott on Shipping, 3d ed., p. 435, and The Lady Durham Stuart, 3 Hagg. 196, 201) is removed; citing 17 & 18 Vict., c. 104, sec. 183. This would hardly seem to be a conclusive, if a valid, reason, since a seaman's duties on board ship are clearly defined and the performance thereof strictly enforced, and the power and authority of the master settled, and even in case of the wreck of the ship, their contract is not dissolved, but they are still obligated to labor for its preservation, as well as for that of the cargo: The Two Catherines, 2 Mason (U. S.), 319. Again it is held that a persistent shirking or neglect of duty, or an attitude of insolence or defiance, which is continued, or any acts of premeditation which discover an intent to coerce or restrain the master in discharging his duty, constitutes a sufficient cause of discharge: The T. F. Oakes, 36 Fed. Rep. 442. It is likewise true that wages may be forfeited by desertion: Coffin v. Jenkins, 3 Story (U. S.), 108; Disbrow v. The Walsh Bros., 36 Fed. Rep. 607; The Brig Cadmus v. Matthews, 2 Paine (C. C.), 277. See The Rothenay, 34 Fed. Rep. 80. And desertion is also made a criminal offense by statute in the United States: Rev. Stat. U. S., sec. 4596. Although this act is held not to apply to coasting vessels: United States v. Mason, 34 Fed. Rep. 129. The conclusion would, therefore, by analogy, as in other cases, at least of lien and certainly on as valid grounds as in the case of profits, freight to be earned, and the like, seem to be, that seamen ought to have an insurable interest in future wages. They certainly have a right in property to which the risk would attach. It is, therefore, for their interest that there

voyage being broken up and the ship and cargo sold in a port of necessity, nevertheless a policy having been effected, he may recover the whole, the loss being total.[256]

§ **1024. Fishing Voyage — Outfits.**—Undoubtedly, the owners may have an insurance upon ship outfits and catchings to the extent of their interest in a fishing voyage.[257] Mr. Phillips says that "the interest of the officers and men is insured under the description of 'share' in whaling voyages, and 'lay' in cod fishing and mackerel fishing." [258] In Hancox v. Fishing Insurance Company[259] the policy was on clothes and the proceeds of the same on a sealing voyage for seal and oil. In accordance with custom, all kinds of stores for the crew's use were carried and sold to the crew, an account was kept of the sales made, and at the termination of the voyage they received

should be a safe arrival of ship and cargo, that freight be earned, or that it might be earned; they are certainly as much interested in the preservation of the ship as they would be in case wages are advanced, which are said to belong to seamen, even if not subsequently earned: The Mentor, 4 Mason (U. S.), 102. And the argument against his right to insure would be equally applicable to his right to the share of the proceeds of a whaling voyage: See Webster v. De Tastet, 7 Term Rep. 157. And another may insure advances made thereon: Robertson v. New York Ins. Co., 2 Caines (N. Y.), 357; 1 Johns. (N. Y.) 616. And finally, the policy could easily be so framed as to obviate all substantial and serious objections, except possibly to this extent, that a serious objection might perhaps exist in this, that it would in all probability afford only another opportunity to that class who ever look upon seamen as their legitimate prey, and their earnings as their rightful spoil, to defraud seamen by obtaining assignments of their policies, or otherwise holding them as collateral, against which the terms of the policy could only in a measure afford protection, and the law has guarded the rights of seamen with much jealousy with the exception of prohibiting an insurance by them of their wages. The rule, however, is so firmly established against such insurances, that it is doubtful if any change could be effected which the courts would uphold, unless brought about by legislative action.

[256] New York Ins. Co. v. Robinson, 1 Johns. (N. Y.) 616; 2 Caines (N. Y.), 357.

[257] For an explanation of the different terms used, and of the nature of these various insurable interests, see 1 Phillips on Insurance, 3d ed., 196, secs. 343-45.

[258] Id., sec. 344; he cites no authorities.

[259] 3 Sum. (C. C.) 132.

the balance due from their proportion of the proceeds of the catchings. The master received from the insured the clothes insured, and was to receive a commission for their sale; nearly all had been sold to the crew. The vessel was wrecked, having on board a small proportion in value of the clothing and the catchings, of which all was lost except a quantity of sealskins and a portion of the oil, but this was insufficient to reimburse the owners the advances made, and it was held that by the sales effected the insured acquired an interest in the voyage equal to the sales; that the perils insured against not only protected the goods unsold, but was a protection against the loss of the voyage and adventure; that the policy was not on wages or a share in lieu of wages, but simply on the property originally shipped; that the owner insured his own interest in the voyage and not the seamen's, but was upon the proceeds of the adventure, as far as the plaintiff could or might have a lien thereon for his advances to the seamen; that it was analogous to an insurance upon outfits in a fishing or whaling voyage, and that insurers were liable for a total loss. It was also held an insurance upon outfits in a whaling voyage does not terminate pro tanto with their consumption or destruction, but attaches upon the proceeds of the adventure, though not strictly considered the proceeds of the outfits. Story, J., in considering the question raised in the case that the insurance was void as against public policy, as being in effect an insurance on seamen's wages, says it is not such a case, and that he desired to express no opinion whether an insurance by the seamen themselves on their share of the proceeds of the adventure would be good as in the nature of wages. A policy on the ship will not cover the outfits of a whaling voyage,[260] nor are outfits "goods."[261]

§ **1025. Captors.**—No individual can acquire any interest in prizes unless under grant and commission from the government, for in it rests the sole and exclusive right to all prizes, and for this reason, and by virtue of its prerogative, all captures will inure to the government's use when made without

[260] Hoskins v. Pickersgill, 3 Doug. 222.

[261] Hill v. Patten, 8 East, 373. As to what is meant by outfits, see Macy v. Whaling Ins. Co., 9 Met. (Mass.) 364, per Hubbard, J.

such grant and commission.[262] But the early English cases hold that captors have an insurable interest in the captured property when entitled by law to have their claim allowed, or where there is a reasonable expectation, warranted by almost universal practice, that it will be allowed, their interest being commensurate with such a share of the proceeds as they would be entitled to by law in case of condemnation and sale. So, also, in case of their responsibility for the care and protection of captured property; for where the captors have possession, certain cares and obligations, by virtue of the laws of civilized countries, result therefrom. The capture may be legal or it may be improperly made. In the former case, they would be entitled; in the latter instance, they may be compelled to render back property which may transpire to be neutral, and the possession is, therefore, coupled with the liability and responsibility.[263]

[262] The Joseph, 8 Cranch (U. S.), 451; 1 Gall. (C. C.) 545, per Story, J. "The right of the captor to the property which he may seize as a prize of war is derived under his commission, which is general and unqualified as to place and circumstances, and not from any peculiar merit which he may claim in any particular case": The Joseph, 8 Cranch (U. S.), 451, per Washington, J. "In the United States there are not, strictly speaking, any such things as 'droits of admiralty.' The sole and exclusive right to all prizes rests in the government, and no individual can acquire any interest therein unless under its grant and commission; and all captures, therefore, made without such grant and commission inure to the use of the government by virtue of its general prerogative": The Joseph, 1 Gall. (C. C.) 545, 558, per Story, J. See The Mary Ford, 3 Dall. (U. S.) 188; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; United States v. Peters, 3 Dall. (U. S.) 121.

[263] The text is substantially the language of the courts in the early and leading English cases. See Le Cras v. Hughes, 3 Doug. 81; cited in 1 Marshall on Insurance, ed. 1810, *108; Crawford v. Hunter, 8 Term Rep. 13; Lucena v. Crawford, 3 Bos. & P. 75. These two cases were before the courts from 1798 until 1808, when they were finally determined: See s. c., 2 Bos. & P. N. R. 269; 1 Taunt. 324; 5 Bos. & P. 270; Stockdale v. Dunlop, 6 Mees. & W. 224; De Vaux v. Steele, 6 Bing. (N. C.) 370; Nicoll v. Goodall, 10 Ves. 157; Routh v. Thompson, 11 East, 428; 13 East, 274; Stirling v. Vaughn, 2 Camp. 225; 11 East, 619; Boehm v. Bell, 8 Term Rep. 154. The case of Lucena v. Crawford is given a lengthy consideration in 2 Duer on Insurance, ed. 1846, 166; Le Cras v. Hughes, Crawford v. Hunter, and Lucena v. Crawford are noted at length in 1 Marshall on Insurance, ed. 1810,

§ **1026. Mortgagor and Mortgagee—Generally.**—It is well settled that a mortgagor and mortgagee have each an independent insurable interest in the property,[264] and the insurance may be upon the same property, and their particular interest need not be disclosed, unless specially inquired about.[265] Both interests may be covered by one policy,[266] or each may take out a separate policy, and this without the insurance impairing that of the other.[267] And the separate policies may be taken out at the same time;[268] for the contract of insurance on property cannot in any case afford more than an indemnity.[269] Nor is an insurance by the mortgagor and mortgagee open to the objection that it is a double insurance.[270]

§ **1027. Mortgagor.**—It is clearly evident that a mortgagor's interest in the property still exists notwithstanding it is mortgaged, and this is so without reference to the nature of the title conferred by the mortgage, for whether the conveyance be considered, as in some states, a pledge—a mere security for the payment of the debt, not passing any estate or right of possession in or to the mortgaged premises—or whether it pass, as in other states, the legal title subject to defeasance by the performance of the conditions of the deed, or whether it pass, as in still other states, the legal title with the

*108, et seq., and all the cases are examined in 1 Arnould on Marine Insurance, Perkins' ed. 1850, 268-79, *263-74; 1 Parsons on Marine Insurance, ed. 1868, 202, et seq. and notes.

[264] Honore v. Lamar etc. Ins. Co., 51 Ill. 409; Irving v. Richardson, 2 Barn. & Adol. 193; McDonald v. Black, 20 Ohio, 185; Carpenter v. Providence-Washington F. Ins. Co., 16 Pet. (U. S.) 495, 501; Manson v. Phœnix Ins. Co., 64 Wis. 26; Smith v. Lascelles, 2 Term Rep. 187.

[265] Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 404.

[266] Honore v. Lamar etc. Ins. Co., 51 Ill. 409.

[267] Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418; 34 Am. Dec. 69; Honore v. Lamar etc. Ins. Co., 51 Ill. 409.

[268] Manson v. Phœnix Ins. Co., 64 Wis. 26.

[269] Honore v. Lamar etc. Ins. Co., 51 Ill. 409.

[270] Dick v. Franklin F. Ins. Co., 81 Mo. 103; 10 Mo. App. 376; Guest v. Fire Ins. Co., 66 Mich. 98; Westchester F. Ins. Co. v. Foster, 90 Ill. 121; Titus v. Glens Falls etc., 81 N. Y. 415; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 396; Carpenter v. Continental Ins. Co., 61 Mich. 635.

right of possession till payment be made, nevertheless, since a right of redemption attaches as a necessary incident to the mortgage, it follows indisputably that the mortgagor is interested in the preservation of the mortgaged property, and therefore has an insurable interest therein, and may insure for his own benefit. This is well settled.[271] And a mortgagor has an insurable interest, even though the mortgage debt be equivalent to the full value of the property;[272] for the amount of the mortgage cannot affect the question of the right of the mortgagor to insure.[273] And where the owner of land makes a conveyance by deed absolute intended for a mortgage, he may insure.[274]

§ **1028. Mortgagor of Personal Property.**—A mortgagor of personal property may insure it for his own benefit,[275] and such policy being effected loss payable to the mortgagee, as his interest may appear, the insurer cannot defend on the ground that the mortgagor has no insurable interest.[276]

§ **1029. Extent of Mortgagor's Insurable Interest.**—The mortgagor's insurable interest covers the full value of the mortgaged premises, whether the mortgage be effected before or after the policy was made; for in case of loss he would be

[271] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; Washington etc. Ins. Co. v. Kelly, 32 Md. 421; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Walsh v. Philadelphia F. Assn., 127 Mass. 383; Guest v. Fire Ins. Co., 66 Mich. 98; French v. Rogers, 16 N. H. 177; Warring v. Loder, 53 N. Y. 581; Allen v. Franklin F. Ins. Co., 9 How. Pr. (N. Y.) 501; Carter v. Rockett, 8 Paige (N. Y.), 437; Insurance Co. v. Stinson, 103 U. S. 25; Columbia Ins. Co. v. Laurence, 2 Pet. (U. S.) 25; Swift v. Mutual etc. Co., 18 Vt. 305; Mechler v. Phœnix Ins. Co., 38 Wis. 665. See, also, cases under preceding section.

[272] Insurance Co. v. Stinson, 103 U. S. 25; Gordon v. Massachusetts Ins. Co., 2 Pick. (Mass.) 249; Allston v. Campbell, 4 Brown Parl. C. 476; Higginson v. Dall, 13 Mass. 96.

[273] Guest v. Fire Ins. Co., 66 Mich. 98.

[274] Hodges v. Tennessee F. & M. Ins. Co., 8 N. Y. 416.

[275] Kronk v. Birmingham F. Ins. Co., 91 Pa. St. 300; 9 Ins. L. J. 26.

[276] Appleton Iron Co. v. British American Assur. Co., 46 Wis. 23; 50 N. W. Rep. 1100; 8 Ins. L. J. 177.

deprived of the insured property, and still be obligated to pay the mortgage debt.[277]

§ **1030. Mortgagor of Ship.**—The rule that a mortgagor has an insurable interest, and may insure to the full value, even though the mortgage debt equals the full value of the property, applies to the mortgagor of a ship.[278] The mortgagor of a vessel covenanting to repay the debt and to insure the vessel has an insurable interest, which is not liable to forfeiture through violation of the act of 1831, regulating the foreign and coasting trade on the northern and other frontiers, by sale to an alien.[279]

§ **1031. Mortgagee.**—It is undoubted that a mortgagee has an insurable interest in the mortgaged premises, separate and distinct from that of the mortgagor, for the property is relied upon as security for the payment of the debt, and he is interested that it should be protected for this purpose.[280] And the special interest of the mortgagee is insurable, either generally, when he insures as entire owner, or specially, when the nature of his interest is specified in a memorandum; but in

[277] French v. Rogers, 16 N. H. 177; Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 40; Insurance Co. v. Stinson, 103 U. S. 25; Gordon v. Massachusetts Ins. Co., 2 Pick. (Mass.) 249; Allen v. Franklin F. Ins. Co., 9 How. Pr. (N. Y.) 501. See Nussbaum v. Northern Ins. Co., 37 Fed. Rep. 524; Walsh v. Philadelphia F. Assn., 127 Mass. 383; Allston v. Campbell, 4 Brown Parl. C. 476; Lazarus v. Commonwealth Ins. Co., 19 Pick. (Mass.) 81.

[278] Higginson v. Dall, 13 Mass. 96; Allston v. Campbell, 4 Brown Parl. C. 476; Gordon v. Massachusetts Ins. Co., 2 Pick. (Mass.) 249.

[279] Wilkes v. People's F. Ins. Co., 19 N. Y. 184.

[280] Addison v. Kentucky etc. Ins. Co., 7 B. Mon. (Ky.) 470; Fox v. Phœnix etc. Ins. Co., 52 Me. 333; Haley v. Manufacturers' Ins. Co., 120 Mass. 292; Davis v. Quincy etc. Ins. Co., 10 Allen (Mass.), 113; King v. State Mut. F. Ins. Co., 7 Cush. (Mass.) 1; 54 Am. Dec. 683; Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404; Kernochan v. New York etc. Ins. Co., 5 Duer (N. Y.), 1; 17 N. Y. 428; Tillou v. Kingston etc. Co., 7 Barb. (N. Y.) 570; Foster v. Van Reed, 70 N. Y. 19; Insurance Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541; Insurance Co. v Updegraff, 21 Pa. St. 513; Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495; Holbrook v. American Ins. Co., 1 Curt. (C. C.) 193.

either case he recovers only to the extent of his interest.[281] So he may insure generally without disclosing his interest, unless inquired of respecting it.[282]

§ 1032. Mortgagee under Mortgage only Valid in Equity.—A mortgage only valid in equity, as in case of a mortgage by a husband to his wife based upon a valid consideration, gives an insurable interest.[283]

§ 1033. Relation Mortgagee's Insurance Sustains to the Debt.—Strictly speaking, the mortgage debt is not insured. Insurance involves the presumption that the thing insured is or will be exposed to some risk. The mortgagee's contract with the insurers is based upon a consideration that in case of loss by certain perils to which the mortgaged property, not the debt, may be subject, the latter will indemnify the former in accordance with the terms of the contract. An insurable interest in the property is necessary. The extent of this insurable interest is an important element, for insurance is a contract of indemnity, and so far the debt is a factor, but the insurance does not guarantee the payment of the debt; the debt may exceed the value of the property. The contract does not attempt to provide that in case of loss the amount of the debt shall be the measure of indemnity, irrespective of the actual value of the property. The mortgagee's security for the payment of the debt depends upon the safety of the property. If there be an appreciable loss, the capacity of the property to pay the debt has been affected. A partial destruction, even though the value of the remaining portion equal the amount of the debt, may materially impair the value of the property as a security, and make the investment less safe than before, or cause such a change therein as to practically injure the chances of realizing the debt therefrom. It is, therefore, for the mortgagee's interest that the property should be protected from certain risks to which it may be exposed, and it is the property which the policy covers and to which the risk attaches.[284]

[281] Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546.

[282] King v. Mutual F. Ins. Co., 7 Cush. (Mass.) 1; 54 Am. Dec. 683.

[283] Mix v. Andes Ins. Co. etc., 9 Hun (N. Y.), 397.

[284] "The interest of the mortgagor is in the whole property just as it exists, undamaged by fire at the date of the policy. If that prop-

§ **1034. Mortgagee of Ship.**—A mortgagee of a ship has an insurable interest therein, distinct from that of the owner, and may effect an insurance thereon to protect his own interest,[285] and he may agree with the mortgagors to effect a policy on the ship at their expense. And where by mistake the mortgagees represented that such insurance had been effected, and the vessel was sent to sea and totally wrecked—the mortgagees, however, in the meantime having insured against absolute lotal loss—and the mortgagees were compelled to indemnify the mortgagors, it was held that the former were subrogated to the latter's rights, and had an insurable interest sufficient to warrant a recovery by them against the insurers.[286] So the mortgagee may insure his interest even though the vessel continues in the mortgagor's possession,[287] and he may by the policy cover not only his own interest, but that of the mortgagor;[288] and he can recover upon an insurance against barratry of the master, "unless the insured is owner of the vessel," even where the loss occurs by reason of such barratry.[289] And where A transferred his title to a vessel to a British subject and took a mortgage back for the price, no money passing, and the transfer being intended to enable the vessel to be run as a British vessel, it was held that A retained to the extent of the mort-

erty is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great or so safe or so valuable as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium": Per Folger, J., in Excelsior F. Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 358; Smith v. Columbia Ins. Co., 17 Pa. St. 253, per the court; Kernochan v. New York Bowery F. Ins. Co., 17 N. Y. 428, per the court; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495, per Story, J.

[285] Clark v. Washington Ins. Co., 100 Mass. 509; 1 Am. Rep. 135; Irving v. Richardson, 2 Barn. & Adol. 498, per Parke, J.; Smith v. Lascelles, 2 Term Rep. 187; Curling v. Lang, 1 Bos. & P. 636, per Eyre, C. J.; Crawford v. St. Lawrence County Ins. Co., 8 U. C. Q. B. 135; Hobbs v. Hannum, 3 Camp. 93; Smith v. Lascelles, 2 Term Rep. 187.

[286] Levy v. Merchants' Mar. Ins. Co., 52 L. T. 263.

[287] Crawford v. St. Lawrence County Ins. Co., 8 U. C. Q. B. 135.

[288] Irving v. Richardson, 2 Barn. & Adol. 193; 1 Moody & R. 153.

[289] Clark v. Washington Ins. Co., 100 Mass. 509; 1 Am. Rep. 135.

gage an insurable interest in the vessel.[290] But in case the master executes an instrument in the nature of a mortgage, which he has no power to give, such mortgage is void, and necessarily no insurable interest exists thereunder.[291]

§ **1035. Mortgagee of Goods and Freight.**—A factor to whom goods and freight have been mortgaged for advances has a legal interest in the property upon the goods being consigned and the bill of lading indorsed to him, and may insure the same for his own benefit.[292]

§ **1036. Extent of Mortgagee's Insurable Interest.**—A mortgagee's insurable interest is prima facie the value mortgaged; it extends only to the amount of the debt, not exceeding the value of the mortgaged property.[293] And in case of an insurance upon a ship to her full value by the mortgagee, the recovery is limited to his insurable interest, unless it appears that it was intended that the policy cover the interest of mortgagor and mortgagee.[294]

§ **1037. Several Mortgagees.**—Each of several mortgagees claiming upon the same property has an insurable interest to the extent of his particular interest.[295]

§ **1038. Mortgagor's Interest after Judgment or Decree.**—While the right in equity to redeem the mortgaged premises exists, the mortgagor retains an insurable interest therein, even though there has been a judgment or decree of

[290] Slocovich v. Oriental Mut. Ins. Co., 13 Daly (N. Y.), 264.

[291] Stainbank v. Fleming, 11 Com. B. 51.

[292] Smith v. Lascelles, 2 Term Rep. 187.

[293] Smith v. Columbia Ins. Co., 17 Pa. St. 253; Excelsior F. Ins. Co. v. Royal Ins. Co. etc., 55 N. Y. 343; 7 Lans. (N. Y.) 138; Irving v. Richardson, 2 Barn. & Adol. 498, per Parke, J.; Sussex Co. Mut. Ins. Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495; Slocovich v. Oriental Mut. Ins. Co., 13 Daly (N. Y.), 264; Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404; Addison v. Kentucky etc. Ins. Co., 7 B. Mon. (Ky.) 470.

[294] Irving v. Richardson, 2 Barn. & Adol. 193; 1 Moody & R. 153; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495.

[295] Fox v. Phœnix Ins. Co., 52 Me. 333.

foreclosure, because he has an interest in the preservation of the property; for the destruction of the property would lessen the value of his equity of redemption.[296] Thus, where the mortgagee foreclosed, and the owner was by the decree to have fifteen months to redeem, it was held that he had an insurable interest at the time of loss; the property being burned at the time of redemption.[297] But the mortgagor cannot insure after the period of redemption has expired.[298]

§ **1039. Mortgagor after Foreclosure Sale.**—A mortgagor's insurable interest exists although his right in equity to redeem has been seized and sold on execution; the time for redeeming not having expired.[299] And where at the time of the fire the property had been bid in by the mortgagee at a mortgagee's sale, but the deed had not been delivered, and on account of the fire the mortgagee refused to accept a deed, it was held that there had not been a sale or alienation, and that the original owner had an insurable interest at the time of the fire.[300] And it seems that where the mortgagee's right of possession is not acquired until he receives the deed, and no deed has been delivered, and the mortgagor still has the right to occupy the premises or to the possession and collection of rents, that the right to redeem is not absolutely barred, although there has been a foreclosure of the equity of redemption.[301] Al-

[296] Stephens v. Illinois Ins. Co., 43 Ill. 427; Insurance Co. v. Stinson, 103 U. S. 25; Mechler v. Phœnix Ins. Co., 38 Wis. 665; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40; 20 Am. Dec. 507; Cone v. Niagara F. Ins. Co., 60 N. Y. 619; Walsh v. Philadelphia F. Assn., 127 Mass. 383; Waring v. Loeder, 53 N. Y. 581; Carpenter v. Insurance Co., 16 Pet. (U. S.) 495; 4 How. 185; Buffalo Steam Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 401. See Allen v. Franklin F. Ins. Co., 9 How. Pr. (N. Y.) 501; Buffam v. Bowditch, 10 Cush. (Mass.) 540.

[297] Stephens v. Illinois Mut. Ins. Co., 43 Ill. 327.

[298] Essex Savings Bank v. Meriden Ins. Co., 57 Conn. 335.

[299] Stephens v. Illinois Mut. Ins. Co., 43 Ill. 327; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40; 20 Am. Dec. 507; Cone v. Niagara F. Ins. Co., 60 N. Y. 619; Buffum v. Bowditch Mut. Ins. Co., 10 Cush. (Mass.) 540; Cheney v. Woodruff, 45 N. Y. 98; Waring v. Loder, 53 N. Y. 581.

[300] Marts v. Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

[301] Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Insurance Co. v. Sampson, 38 Ohio St. 672; Marts v. Cumberland

though it is held in McLaren v. Hartford Fire Insurance Company[302] that the deed relates to the time of the sale, and the property is then at the risk of the purchaser, and that in case of a sale by a master in chancery, part of the purchase money being paid, the mortgagor's insurable interest terminated, even though the decree was not enrolled nor the deed executed at the time of sale. In another case, however, in the same state the insured had the right to redeem the premises from a sale made by the sheriff under an execution issued upon a judgment against the property, and though that right had been lost certain judgment creditors had a right to redeem. The policy had been made payable in case of loss to another, who had agreed under seal that the insured might occupy a certain portion of the premises, although not the insured house, and should be entitled to various privileges in regard to other portions of the property, and, in case said payee obtained title, he would discharge and release the insured from the mortgages and certain liabilities. It was held that the right of the judgment creditors to redeem the premises not having lapsed, the insured had a beneficial interest in the preservation of the buildings, which was an insurable interest, and which continued until the last day for judgment creditors to redeem; for until that last day it was possible for him to find some one who would advance the money, take the judgment, and make immediate redemption.[303] Among the cases relied on by the court in this case as supporting its decision is that of Cheney v. Woodruff,[304] where it was held that the

Mut. F. Ins. Co., 44 N. J. L. 478; Buffalo Steam Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 401.

[302] 5 N. Y. (1 Seld.) 151; Edm. Sel. Cas. 210. The court said: "The sale is strictly judicial, binding all parties from the time when the property is struck off, and cannot be set aside in general, except for reasons which would prevent a specific performance in case of a contract of purchase between individuals. . . . . The insurance in question was made by McLaren as owner. By the sale he was foreclosed and divested of every right in or to the premises, except the formal legal title. He had no interest in them, and consequently could claim no indemnity for their loss."

[303] Cone v. Niagara F. Ins. Co., 60 N. Y. 619; 3 N. Y. S. C. 33.

[304] 45 N. Y. 98.

purchaser at a mortgage foreclosure sale is not entitled to the rent of the premises accruing between the time of purchase and the time of the delivery of the deed to him. So if the title has passed after sale, if the mortgagee agrees to extend the time of redemption, the mortgagor's interest continues.[305] The theory of these decisions is that while the right to redeem exists, the title is not devested, and a loss by decreasing the value of the premises lessens the value of the right to redeem, and the case of Cone v. Niagara, etc., carries the rule, as we have noted, to the extent of holding that even though the right of the insured, as owner in fee, to redeem had passed out of him, there was a right of judgment creditors, even those to be created by a loan and of judgment, to redeem which gave the insured a beneficial interest. Where a foreclosure sale is vacated for irregularity, and the order of confirmation set aside, the insurable interest of the mortgagor remains, and continues precisely as though no sale had been attempted.[306]

§ 1040. Effect of Sale or Conveyance on Mortgagor's Interest—Devestment of Interest.—Where the mortgagor's bond accompanies the mortgage, his insurable interest continues in the premises after a sale thereof by him.[307] And where the title is conveyed by the mortgagor, subject to the performance by him of certain conditions, his insurable interest continues where the stipulated conditions are not performed and the property reconveyed; as where the mortgagor of a vessel sold it and agreed to pay off the mortgage but failed to perform the condition, and the vessel was reconveyed before the loss, the insurable interest was held not devested.[398] Nor is he deprived of his right to insure by his executory contract to convey or assign his interest in the mortgage,[309] although it is held that one who has a contract for the purchase of a mortgage, the purchase money being payable by installments, and who has

[305] Stephens v. Illinois Ins. Co., 43 Ill. 427.

[306] Richland County Mut. Ins. Co. v. Sampson, 38 Ohio St. 672.

[307] Waring v. Loder, 53 N. Y. 581; Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40.

[308] Worthington v. Bearse, 12 Allen (Mass.), 382.

[309] See Haley v. Manufacturers' Ins. Co., 120 Mass. 292.

made part payment under the contract, is, in equity, the owner of the mortgage, and his insurable interest in the property covered by it is the full amount due and to become due thereon;[310] nor is the mortgagor's interest affected by a transfer made after suit brought;[311] nor is it destroyed by the mere fact of itself that the mortgagee has taken possession.[312]

§ 1041. Cessation of Mortgagor's Interest.—A mortgagor's insurable interest is determined by a payment which discharges the debt, and in case of part payment only it is determined pro tanto, and his interest continues to the extent of the unpaid portion.[313] So, also, if the property be absolutely transferred before loss, his interest determines,[314] and if the mortgagor procures insurance and quitclaims his interest to the mortgagee, without ratification of the act as required by the company's charter, the interest of the mortgagor is thereby devested, and this although the policy is assigned to the mortgagee with the company's consent.[315]

§ 1042. Effect on Mortgagee's Interest of Sale and Assignment.—The mortgagee still has an insurable interest, although he assigns the mortgage and notes for his ultimate liability; upon his assignment of the notes, his consequent interest in having them satisfied out of the insurance money is a sufficient interest.[316] Where L. and S., the mortgagees of certain premises, assigned the mortgage and indorsed the mortgage notes to plaintiff, and procured the premises to be insured in their names as mortgagees, loss, if any payable to plaintiff, and some of the notes were not paid at maturity, and the others had not matured when the loss occurred, it was held that

[310] Excelsior F. Ins. Co. v. Royal Ins. Co., 7 Lans. (N. Y.) 138.

[311] Insurance Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541.

[312] Illinois F. Ins. Co. v. Stanton, 57 Ill. 354.

[313] Sussex Co. Mut. Ins. Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541; Carpenter v. Washington Ins. Co., 16 Pet. (U. S.) 495.

[314] Carpenter v. Washington Ins. Co., 16 Pet. (U. S.) 495.

[315] Hazard v. Franklin Mut. Ins. Co., 7 R. I. 429; Hoxsie v. Providence Mut. Ins. Co., 6 R. I. 517.

[316] New England Ins. Co. v. Whitmore, 32 Ill. 221.

L. and S. had an insurable interest, and that plaintiff could recover.[317] Again, a mortgagee of certain hotel property agreed to sell the chattels to another, who gave certain notes for the purchase money. The mortgage was to be retained by the mortgagee as security therefor; possession also was to remain in the latter, and upon nonpayment of the notes, or either of them, a right to foreclose and sell the property was reserved. Part payment was made. The purchaser had agreed to insure, but not having done so, the mortgagee insured in his own name. It was held that the mortgagee's insurable interest was not affected by such part payment; that it did not operate as a pro tanto discharge of the mortgage debt; that the agreement was merely collateral to the mortgage, and that the purchaser's liability for the cost of the insurance did not enter, as between the insurer and insured, into the insurance contract.[318] So the assignment of a portion of the mortgage debt does not devest the mortgagee's insurable interest,[319] nor is his right to insure affected by a conveyance by the mortgagor,[320] and where one of the part owners releases his equity of redemption to the mortgagee, his interest is rather increased than diminished.[321]

§ 1043. Disclosure of Interest by Mortgagee.—The rule broadly stated is, that the mortgagee, unless interrogated, or unless the contract require a specific statement of his interest, need not disclose its exact nature, and he may insure as owner or as mortgagee;[322] and it is sufficient to describe him as mortgagee, although the policy provides that if the interest of the assured is any other than an entire, unconditional, and sole

[317] Williams v. Roger Williams Ins. Co., 107 Mass. 377; 9 Am. Rep. 41.

[318] Haley v. Manufacturers' F. & M. Ins. Co., 120 Mass. 292.

[319] Rex v. Insurance Co., 2 Phila. (Pa.) 357.

[320] Dick v. Franklin F. Ins. Co., 81 Mo. 103; 10 Mo. App. 376.

[321] Heaton v. Manhattan Ins. Co., 7 R. I. 502.

[322] Norwich F. Ins. Co. v. Boomer, 52 Ill. 442, per Walker, J.; Williams v. Roger Williams Ins. Co., 107 Mass. 377; 9 Am. Rep. 41; Buck v. Phœnix Ins. Co., 76 Me. 586. See Pelton v. Insurance Co., 77 N. Y. 605; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Franklin F. Ins. Co. v. Martin, 40 N. J. L. (11 Vroom) 568; 29 Am. Rep. 271; Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541.

ownership, it shall be so expressed, and that his interest as mortgagee or otherwise shall be truly stated.[323]

§ **1044. Assignee of Mortgagee.**—The assignee of a mortgagee has an insurable interest.[324] The insurable interest of the assignee of a mortgagee is not simply the amount actually paid the mortgagee under the contract of assignment, but the whole amount secured and unpaid upon the mortgage.[325]

§ **1045. Mortgagor for Mortgagee.**—There may be a covenant that the mortgagor insure for the benefit of the mortgagee, and the policy may be issued to the mortgagor, payable in case of loss to the mortgagee.[326] Such a policy is an insurance of the mortgagor's interest;[327] but it does not make the mortgagee an assignee,[328] although it may vest in him certain rights substantially like those an investment of a policy without such provision as collateral security for the mortgage debt would have given the mortgagee.[329] However, in determining

[323] Williams v. Roger Williams Ins. Co., 107 Mass. 377.

[324] Insurance Co. v. Woodruff, 26 N. J. L. 541.

[325] Excelsior F. Ins. Co. v. Royal Ins. Co., 55 N. Y. 343; 14 Am. Rep. 271.

[326] Jackson v. Farmers' etc. Ins. Co., 5 Gray (Mass.), 52; Smith v. Union Ins. Co., 120 Mass. 90; Connecticut Mut. L. Ins. Co. v. Scannon, 4 Fed. Rep. 263; Baldwin v. Phœnix Ins. Co., 60 N. H. 164; Turner v. Quincy Ins. Co., 109 Mass. 568; Grosvenor v. Atlantic F. Ins. Co. etc., 17 N. Y. 391; 5 Duer (N. Y.), 517.

[327] Baldwin v. Phœnix Ins. Co., 60 N. H. 164; Deering's Annot. Civ. Code Cal., secs. 2541, 2542. See Carpenter v. Providence-Washington F. Ins. Co., 16 Pet. (U. S.) 495, 501, on distinction between mortgagor's and mortgagee's insurable interest.

[328] "The provision of the policy that the loss should be payable to the mortgagee operated to give the mortgagee precisely the same rights and interests in the policy which it would have had if without such words the policy had been assigned as collateral security to the mortgage debt": Connecticut M. L. Ins. Co. v. Scammon, 4 Fed. Rep. 263.

[329] Baldwin v. Phœnix Ins. Co., 60 N. J. 164, the court said: "The indorsement upon the policy, 'payable to S. S. Thompson, as his mortgage claim may appear,' was not an assignment of the policy, nor an insurance of Thompson's interest as mortgagee, but merely a promise of the defendants to pay him such sum as should become payable to Baldwin thereon. It did not make Thompson an assignee of the policy, but merely the payee in case of loss."

the exact rights of a mortgagee under such a policy many considerations arise. Thus, the amount of the mortgagee's interest with reference to the value of the property and the amount of the policy, is important, and must necessarily control the mortgagee's right to enforce the contract.[330] So the very terms of the policy may determine his rights absolutely. These questions, however, will be considered hereafter.[331] A clause in the mortgage that the mortgagor shall insure does not prevent the mortgagee from effecting an insurance independently thereof for his own benefit.[332]

§ **1046. Mortgagee after Foreclosure Sale.**—A mortgagee's insurable interest as such will continue after foreclosure and sale under execution, although the loss does not occur until after the time limited by the decree for redemption has expired, if there is an agreement between the parties that a longer time shall be allowed than that fixed by the decree.[333] And a purchase at a foreclosure sale by the mortgagee effects no change of insurable interest.[334]

§ **1047. Interest in Homestead.**—The head of a family whose property has been set apart as a homestead has still an insurable interest therein,[335] and a husband who occupies a house and the land upon which it is situated with his wife and family, as a homestead, has an insurable interest therein.[336] But a woman cannot claim a homestead right in the insured property of a former deceased husband where the same has never been set off to her, and she has married again and acquired a homestead right in her second husband's farm,[337] although a wife has an insurable interest in a homestead on which she has erected

[330] Hopkins v. Aurora F. & M. Ins. Co., 48 Mich. 148.

[331] See chap. lxxiv, herein.

[332] Foster v. Van Reed, 70 N. Y. 19.

[333] Stephens v. Illinois etc. Ins. Co., 43 Ill. 327.

[334] 27 Wis. 693.

[335] German-American Ins. Co. v. Davidson, 67 Ga. 11.

[336] Reynolds v. Iowa & M. Ins. Co., 80 Iowa, 563; 46 N. W. Rep. 659; Merritt v. Farmers' Ins. Co., 42 Iowa, 11. But see next section; Carey v. Home Ins. Co. (Iowa, 1896), 66 N. W. Rep. 920.

[337] Home Ins. Co. v. Field, 42 Ill. App. 892; 24 Chic. Leg. News, 122.

buildings and which her husband has given her orally, her equity being such that the husband could not have dispossessed her, and the property being chargeable with the money expended by her upon it.[338] The holder of a lien on a homestead which is only voidable at the instance of the person interested in the homestead has an insurable interest in the property.[339] A husband does not retain an insurable interest in the property, by reason of the fact that the buildings insured were upon the homestead, where he has conveyed the property to his wife and the policy provides that at the time of loss he shall have a bona fide interest in the property insured, either as owner or as mortgagee.[340]

§ **1048. Husband in Personal Community Property.** It it does not appear that there was an intention to make personal property the wife's separate estate, and it is in law community property, the husband has an insurable interest therein.[341]

§ **1049. Husband in Property of Wife.**[342]—The question whether the husband has an insurable interest in the wife's property must depend, in a great measure, upon the statutes of the several states by which the marital rights of a husband in his wife's property are governed. If the loss of the property will deprive him of its possession, enjoyment, or profits, or of any certain benefits growing out of it, or of a security or lien therein, it would seem that he has an insurable interest in such property. But, on the other side, if the wife's management of her property is not limited; if she may control absolutely its income; if she may lease it without his consent, and her lessee may expel him from the possession; if during her lifetime he has no interest, no inchoate rights therein, nor even the right

[338] Rockford Ins. Co. v. Nelson, 65 Ill. 415.

[339] Parks v. Hartford etc. Co., 100 Mo. 373; 12 S. W. Rep. 1058, under Tex. Const., art. 16, secs. 50, 51.

[340] Glaze v. Three Rivers' Farm Mut. F. Ins. Co., 87 Mich. 349; 49 N. W. Rep. 595.

[341] Hanover F. Ins. Co. v. Schrader (Tex. 1895), 31 S. W. Rep. 1100.

[342] See sec. 969, herein.

of occupancy, and after her decease his only rights would be acquired by descent, and not inchoate rights which would be perfected thereby, he would, on general principles, seem to have no such pecuniary interest in the preservation of her property as would constitute an insurable interest.[343] Thus, in Indiana and Maine no insurable interest exists in the husband in such case.[344] But a husband has an insurable interest in his wife's property under the Maryland laws,[345] and a husband who deeds his farm and buildings to his wife, upon an agreement to reconvey at his request, and he has possession and the entire beneficial use of the property, supporting his family out of such use, he has an insurable interest.[346] And if a married woman, being indebted to her husband, gives him a written acknowledgment of the debt, "which shall be a lien on my property," and afterward dies, leaving insufficient personal assets to pay her debts, and but one parcel of land, valuable chiefly for the buildings on it, the husband has an insurable interest in the buildings.[347] So where a husband erects a dwelling-house upon land, the fee of which is in his wife, and shares with her its use and possession, he has an insurable interest therein.[348] So he may insure household furniture, although it be the property of his wife.[349] Again, the husband has an insurable interest in land conveyed by him to his wife upon consideration and a parol agreement of a reconveyance of a life estate, he

[343] See Clark v. Dwelling-House Ins. Co., 81 Me. 373; 17 Atl. Rep. 303 (no interest); Merritt v. Farmers' Ins. Co., 42 Iowa, 11; Agricultural Ins. Co. v. Montague, 38 Mich. 548; 31 Am. Rep. 326; Traders' Ins. Co. v. Newman, 120 Ind. 554; 22 N. E. Rep. 428; Trott v. Insurance Co., 83 Me. 362; 22 Atl. Rep. 245; Ætna Ins. Co. v. Resh, 40 Mich. 241; Rohrbach v. Germania F. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

[344] Traders' Ins. Co. v. Newman, 120 Ind. 554; Clark v. Dwelling-House Ins. Co., 81 Me. 373; 17 Atl. Rep. 303.

[345] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673, under Act 1842, c. 243.

[346] Horsch v. Dwelling-House Ins. Co., 77 Wis. 4; 45 N. W. Rep. 945.

[347] Rohrbach v. Germania F. Ins. Co., 62 N. Y. 47; 20 Am. Rep. 451.

[348] American Central Ins. Co. v. McLanathan, 11 Kan. 533; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

[349] Clark v. Firemen's Ins. Co., 18 La. (O. S.) 431.

being in possession and receiving the proceeds, notwithstanding such conveyance of the life estate has been made.[350] It is held in Michigan that a policy of insurance taken by a husband, in good faith, on his wife's goods is void, even though the insurer had full knowledge of the true ownership;[351] although it is declared in a Pennsylvania case that where a husband in possession with his wife of her estate insures the same, a presumption exists that his act has been ratified.[352] A New York case presents rather unusual facts, upon which it was held that a husband had an insurable interest in the property of his wife. It appeared that a few days after marriage the wife executed to her husband, in consideration of her indebtedness to him before marriage, a paper, stating the amount due and also that she owed, in addition thereto, a certain sum of money for each month he should live with her from and after a certain date, and that such sum should be a lien upon her property.[353] But it is declared that a husband who holds jointly with his wife cannot insure the property as his own.[354] In another case, the charter of a mutual insurance company provided for a lien on the property insured to pay the insured's proportion of losses, and provided that the policies should be valid where the insured had a fee simple unencumbered; otherwise not, unless the true title was expressed. The husband insured in his own name, as owner, to its full value, property belonging to his wife, and the policy was held bad.[355]

§ **1050. Same Subject—Disclosure of Interest.**—It is held that a husband insuring his wife's household goods need not disclose his interest;[356] but it is also held that a husband must specifically insure the right of using the property of his wife, in order to entitle him to recover damages for the loss of it.[357]

[350] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354.

[351] Agricultural Ins. Co. v. Montague, 38 Mich. 548; 31 Am. Rep. 326.

[352] Harris v. York Mut. Ins. Co., 50 Pa. St. 341.

[353] Rohrbach v. Ætna Ins. Co., 1 Thomp. & C. (N. Y.) 339.

[354] Ætna Ins. Co. v. Resh, 40 Mich. 241.

[355] Eminence etc. Ins. Co. v. Jesse, 1 Met. (Ky.) 523.

[356] Clark v. Firemen's Ins. Co., 18 La. (O. S.) 431.

[357] Cohn v. Virginia F. etc. Ins. Co., 3 Hughes (C. C.), 272.

§ **1051. Husband in Life of Wife.**—A husband has an insurable interest in his wife's life,[358] although it is declared in Missouri that the interest must be a pecuniary one.[359]

§ **1052. Husband for Benefit of Wife or Child.**—A husband may insure his life for the benefit of his wife and child, and where such a policy is taken out for or transferred to the wife, she cannot be compelled to inventory it as part of her deceased husband's estate;[360] and such a policy is not terminate by the wife obtaining a divorce where she has children and supports them.[361] And a policy taken out and kept up by a husband for his wife's benefit, without her knowledge, is valid under a statute providing for the insurance of a husband's life for the benefit of his wife.[362]

§ **1053. Wife in her own Property.**—A wife may insure her own separate estate donated to her by her father during marriage,[363] and it would necessarily be true, where by force of the statute the wife has control of her sole and separate estate, no matter how acquired, that she is so far interested in its preservation that she has an insurable interest therein, the same as in other cases where an insurable interest exists. And she can invest money which is part of her separate estate in an insurance policy independently of any enabling statute, and may also give her notes for the premium.[364]

§ **1054. Wife in Husband's Life.**—A wife has an insurable interest in her husband's life,[365] and many of the states provide for such insurance by statute, the policy inuring wholly

[358] Currier v. Continental L. Ins. Co., 57 Vt. 496; 52 Am. Rep. 134.

[359] Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419.

[360] Succession of Hearing, 26 La. Ann. 326.

[361] McKee v. Phœnix Ins. Co., 28 Mo. 383; 75 Am. Dec. 129.

[362] Felrath v. Schonfield, 76 Ala. 199; 52 Am. Rep. 319.

[363] Bread v. Mechanics' etc. Ins. Co., 29 La. Ann. 764.

[364] McQuitty v. Continental L. Ins. Co., 15 R. I. 573; 10 Atl. Rep. 635.

[365] Warnock v. Davis, 104 U. S. 779; Washington Central Nat. Bank v. Hume, 128 U. S. 195; 9 Sup. Ct. Rep. 41; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; Continental L. Ins. Co. v. Palmer, 42 Conn. 60; Baker v. Union Mut. L. Ins. Co., 43 N. Y. 283; Huston v.

or up to a certain sum for the benefit of the wife or child, exclusive of creditors' claims against the husband, and may be taken out generally by the wife herself, in her name or in the name of a third person, with his assent, as her trustee, for the husband's life or a definite period.[366] The Kentucky statute of 1870 is held to include all policies of which married women may be the beneficiaries, and to include policies taken out before the act, but on which the premiums are paid subsequently thereto; but such act is also declared not to have the effect of validating transactions which under former laws would, as to the husband's creditors, have been fraudulent and void.[367] And a statute which provides that the amount of the insurance shall be free from creditors of the husband to an amount purchasable by annual premiums, not exceeding a certain sum

Merrifield, 51 Ind. 24; McKee v. Phœnix Ins. Co., 28 Mo. 383; Gants v. Covenant Mut. L. Ins. Co., 50 Mo. 44. See note 82 Am. Dec. 399. Eadie v. Slimmon, 26 N. Y. 9, is the first case in New York where it holds that the wife has an insurable interest in the life of her husband: Frank v. Mutual L. Ins. Co. of New York, 102 N. Y. 266, 274.

[366] Alabama Code, 1886, vol. 1, sec. 2356. Conn. Gen. Stats. 1888, sec. 2799; Del. Rev. Code, 1874, c. 76, sec. 3; Fla. McClellan's Dig. 1881, p. 534, sec. 22; Ill. Rev. Stats. 1891, p. 839, sec. 54; Kan., 1 Gen. Stats. 1889. sec. 3401; Ky. Pub. Acts, 1869-70, c. 645, secs. 30, 31; 1 Md. Code Pub. Gen. Laws, 1888, p. 321, sec. 117; p. 803, secs. 8-10; 1 Mich. Gen. Stats., secs. 4238, 6300, 6301; Mo. Rev. Stats. 1889, secs. 5851-54; N. H. Gen. Laws, 1878, c. 175, sec. 1. Married woman by herself, in her name, or in the name of a third person as her trustee for a definite period or life, from the claims of her husband's representatives or creditors, except where the annual premium paid out of the husband's property or funds exceeds five hundred dollars, when the excess with interest may be claimed by creditors of the husband: N. Y. Rev. Stats., 8th ed., vol. 4, pp. 2602-3; Ohio 1 Rev. Stats. 1890, secs. 3628-3829; Oklahoma Stats. 1890, p. 636, sec. 19; Pa. 1 Brightley's Purd. Dig. 1883, p. 914, sec. 54; R. I. Pub. Stat. 1882, c. 166, sec. 21; S. C. Gen. Stats. 1882, sec. 1358; S. Dak. Laws, 1890, c. 86, sec. 4; Tenn. Code, 1884, secs. 3335, 3336; Vt. Rev. Laws, 1880, secs. 2340-43; W. Va. Code, 1887, c. 66, secs. 5, 6; Amended Acts, 1891, p. 325, c. 109; Wis. 1 Sand. & B. Annot. Stats. 1889, sec. 2347; 1 Amended Laws, 1891, c. 376; Felrath v. Schonfield, 76 Ala. 199; 52 Am. Rep. 319; Charter Oak etc. Ins. Co. v. Brant, 47 Mo. 419; Baker v. Young, 47 Mo. 453; Thompson v. Cundiff, 11 Bush (Ky.), 567; Smith v. Missouri Valley etc. L. Ins. Co., 4 Dill. (C. C.) 353.

[367] Thompson v. Cundiff, 11 Bush (Ky.), 567, under secs. 30 and 31 Ky. Act, March 12, 1870.

paid by him, does not invalidate a policy where the premium does exceed such sum, but the policy is valid against creditors up to the sum indicated by the premium;[368] nor does such a statute prohibit such insurance of a solvent husband's life to any amount, and there will be an apportionment of the proceeds where part of the premiums exceeding such sum are paid by him when solvent and a part when insolvent.[369] And, under the Missouri statute, the policy may be taken out in the wife's own name or in that of a third person.[370]

§ **1055. Wife without Marriage Ceremony in Husband's Life.**—Although it is held that by the term "wife" is meant a lawful wife,[371] yet a woman has an insurable interest in the life of a man with whom she has for years been living as his wife, notwithstanding there has been no marriage ceremony, where he has openly and notoriously recognized her as his wife, and although she is named in the policy by another name than that of his wife.[372] And substantially the same ruling has been made in Georgia,[373] and there is nothing against public policy in effecting such an insurance.[374]

§ **1056. Dower Interest.**—If the insured has a dower interest only, her recovery is limited to the extent thereof.[375]

§ **1057. In Life of Betrothed.**—It is held that a woman engaged to be married to a man under a valid contract of marriage has an insurable interest in his life, there being nothing in the case to show that the policy was intended as a wager.[376] And it is held under a Massachusetts statute that the

[368] Smith v. Missouri Valley etc. L. Ins. Co., 4 Dill. (C. C.) 353.

[369] Pullis v. Robison, 73 Mo. 201; 39 Am. Rep. 497.

[370] Charter Oak etc. Ins. Co. v. Brant, 47 Mo. 419; Baker v. Young, 47 Mo. 453.

[371] Holabird v. Atlantic Ins. Co., 2 Dill. (C. C.) 166.

[372] Watson v. Centennial Mut. L. Assn., 21 Fed. Rep. 698.

[373] Equitable Assur. Soc. v. Patterson, 41 Ga. 338; 5 Am. Rep. 535.

[374] Phelan v. Phelan (La. 1892), 21 Ins. L. J. 93.

[375] Home Ins. Co. v. Field, 42 Ill. App. 392; 24 Chic. Leg. News, 122. See, also, Hartford F. Ins. Co. v. Haas, 87 Ky. 531; 9 S. W. Rep. 720.

[376] Chisholm v. National Capitol L. Ins. Co., 52 Mo. 213. See Singleton v. St. Louis Mut. L. Ins. Co., 66 Mo. 63.

betrothed of a member may be the beneficiary under a certificate in a mutual benefit society, where she is partly supported by money received by him, notwithstanding no legal obligation rests upon him to render such partial support.[377]

§ **1058. In Servant's Life—Actor's Life.**—A master has an insurable interest in the life of his servant;[378] so has a manager in the life of an actor employed in that capacity.[379] And one who employs another to go to the mines, and work in his place as a substitute, may insure the latter's life.[380] And in case a servant insures his life and assigns the policy to the master, under an agreement that the latter shall pay the premiums and advance his salary, and the employee is shortly thereafter discharged, and dies, his executors may recover the amount of the policy, less the premiums paid.[381]

§ **1059. In Master's Life.**—A servant has been held to have such an interest as to enable him to insure his master's life.[382]

[377] McCarthy v. New England Order of Protection, 153 Mass. 314; 26 N. E. Rep. 866, under Mass. Act, 1882, c. 195, sec. 2. See Supreme Council v. Perry, 140 Mass. 580.

[378] Miller v. Eagle Ins. Co., 2 E. D. Smith (N. Y.), 268, 292. "So I apprehend a master having a legal title to the labor of his servant for a term of years has an insurable interest in the life of such servant, and within the exception in our statute the insurance may be made for the master's indemnity against the loss of his services, by his death": Per the court.

[379] 22 Lond. Law Mag., N. S., 347.

[380] Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. 576.

[381] Scott v. Roose, 3 Ir. Eq. 170.

[382] Hebden v. West, 3 Best & S. 579; 7 L. T., N. S., 854. In this case plaintiff had been for twenty years clerk in a bank of which P. was managing partner. Plaintiff received six hundred pounds salary per year, to continue for seven years. He owed the bank four thousand seven hundred pounds, which P. assured him he should not be called on to pay as long as he (P.) lived. Plaintiff insured P.'s life with the latter's permission. Upon P.'s death it was held that plaintiff could not insure P.'s life by reason of a bare promise as to the collection of the debt, but that he did have an insurable interest in such life, by reason of his employment by P. for a term of seven years, to the extent of as much of the period of seven years as remained at the time the policy was effected.

§ **1060. Earnings of Another—Life.**—One who is interested in another's earnings has an insurable interest in such other's life; as in case the latter, for a valuable consideration, has agreed to work a year in the mines and to give the former a quarter of what he makes, and upon the loss of the insured life within the year the whole insurance money is recoverable.[383]

§ **1061. Promise to Support One not a Relative—Life.** It is held in Pennsylvania that the insurance by one of the life of another living with him, and whom he has supported and promises to support as long as she lives, is not a wager policy, although the insured was not a relative. This was so held upon an action by the executor of the insured to recover the balance of the insurance money remaining over the expense incurred in such support.[384] Although in another case in the same state it was declared, under substantially similar facts, that only enough could be retained of the insurance money to cover the expenses incurred in such support, and that the remainder belonged to the estate of the insured.[385] It is also decided that if a woman agrees to furnish a man with a home, and marry him if she can obtain a divorce, and to pay the premiums on the policy, that he may validly insure his life for her benefit.[386]

§ **1062. Promise to Support Relative—Life.**—A promise to support a relative and provide her with a home is a sufficient consideration for the assignment of a policy on her life where the transaction is bona fide, and the insured is a childless laboring woman living separately and apart from her husband.[387] So it is held in Louisiana that if the relationship warrants a claim for support, that it constitutes a sufficient insurable interest.[388]

[383] Morrell v. Trenton etc. Ins. Co., 10 Cush. (Mass.) 282; 57 Am. Dec. 92.

[384] Batdorf v. Fehler (Pa.), 9 Atl. Rep. 468.

[385] Seigrist v. Schmoltz, 113 Pa. St. 326.

[386] Johnson v. Van Epps, 14 Ill. App. 201.

[387] Fitzgerald v. Hartford L. & Ann. Ins. Co., 56 Conn. 116; 13 Atl. Rep. 673 (two judges dissenting).

[388] Rohrbach v. Piedmont etc. L. Ins. Co., 35 La. Ann. 233, per the court. See sections following, and see note on insurable interest in relative, 84 Am. Dec. 291.

§ **1063. Parent and Child—Life.**—We have, under a prior section,[389] stated the general rule applicable to an insurable interest in a life, and, while the decisions are far from harmonious, there is certainly an evident disposition at the present day on the part of some of the courts to formulate a rule that the mere relation of the parties, in case of parent and child, gives an insurable interest in the life of the parent or child, on the ground of morals and natural affection.[390] But it is distinctly held in other cases that such interest does not arise, and is not to be presumed from mere relationship and natural affection, and that a daughter must allege and prove a pecuniary interest in order to recover an insurance on her mother's life;[391] and that a son must have a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the father's life, where they both live independently, and each has sufficient means, and the son is of mature years.[392] A son has an insurable interest, under a policy taken out by his mother, on her life, payable to him if living, otherwise to her estate, even though he pays all the premiums except

[389] Sec. 888, herein.

[390] Loomis v. Eagle L. & H. Ins. Co., 6 Gray (Mass.), 396, so declared by the court, although the case was directly decided on the ground that the father had a pecuniary interest in the life of a minor son, as he was entitled to his earnings: Forbes v. American Mut. L. Ins. Co., 15 Gray (Mass.), 249; Corson's Appeal, 113 Pa. St. 438; 4 Cent. Rep. 307; Reserve Mut. L. Ins. Co. v. Kane, 81 Pa. St. 154; 9 Phila. (Pa.) 234. In this case the son was liable under the Poor Law for his father's support: Miller v. Eagle Ins. Co., 2 E. D. Smith (N. Y.), 286; Grattan v. National L. Ins. Co., 15 Hun (N. Y.), 74; Hoyt v. New York Ins. Co., 3 Bosw. (N. Y.) 440; Mitchell v. Union L. Ins. Co., 45 Me. 104; 71 Am. Dec. 529. In this case the son was a minor and advances had been made him: Warnock v. Davis, 104 U. S. 779; Washington Central Nat. Bank v. Hume, 128 U. S. 195; 9 Sup. Ct. Rep. 41; Williams v. Washington L. Ins. Co., 31 Iowa, 541; Reif v. Union L. Ins. Co., 18 Cent. L. J. 347; Valley Mut. L. Assn. v. Trewalt, 79 Va. 421; Reif v. Union L. Ins. Co. (Cin. Sup. Ct.), 17 Ins. Chr. 3. See sec. 888, herein.

[391] Continental L. Ins. Co. v. Volger, 89 Ind. 572; 46 Am. Rep. 185.

[392] Guardian M. L. Ins. Co. v. Hogan, 80 Ill. 35; 22 Am. Rep. 180. See, also, Hartford v. Kymer, 10 Barn. & C. 724 (case, father in son's life void without pecuniary interest); Gambs v. Covenant Mut. L. Ins. Co., 50 Mo. 44; Shilling v. Accidental Death Ins. Co., 1 Fost. & F. 116; 27 L. J. Ex. 16.

the first, as manager of her estate.[393] And where a mother is not dependent upon her son, it is held that she has no interest in his life which she may insure.[394] The question of the daughter's insurable interest becomes immaterial where the evidence shows her identity with the person designated as payee, and the amount of the insurance is paid into court by the insurer upon an admission of liability to the insured's daughter, if surviving.[395] If the premiums on a policy on the son's life in the name of his wife are paid by the father, she becomes simply a creditor of the son's estate for the amount paid.[396]

§ **1064. Unborn Child.**—An unborn child may be provided for by a father in a regular life policy, even though he be not named.[397]

§ **1065. Son in Father's Property.**—If a father and son combine to defraud the father's creditors, and obtain an insurance on the latter's property in the son's name, the policy cannot be reformed to enable the father to sue upon it, on the ground of a parol agreement that it should be for the father's benefit, and the son has no such insurable interest as will enable him to retain an action thereon.[398]

§ **1066. Son in law—Stepson—Life.**—A son in law has no insurable interest in the life of his mother in law,[399] neither by reason of his relationship, nor because she lives with him and is dependent upon him for support; nor does he, for the latter reason, acquire an interest as a creditor in her life. If the policy, in such case, be assigned, the assignee is only entitled to claim the amount of fees and expenses disbursed, and

[393] Heinlein v. Imperial L. Ins. Co., 101 Mich. 250; 25 L. R. Annot. 627, and note; 59 N. W. Rep. 615.

[394] Elsey v. Odd Fellows' Mut. Relief Assn., 142 Mass. 224.

[395] Standard L. & A. Ins. Co. v. Catlin (Mich. 1895), 63 N. W. Rep. 897.

[396] Love v. Love, 11 Cent. Rep. 410; 5 Pa. (Ld.) 334.

[397] Sauerbier v. Union Cent. L. Ins. Co., 39 Ill. App. 620.

[398] Baldwin v. State Ins. Co., 60 Iowa, 497.

[399] Rombach v. Piedmont etc. L. Ins. Co., 35 La. Ann. 233; 48 Am. Rep. 239.

if he collects the money, he must account for the balance thereof to the estate,[400] nor does a step-son have an insurable interest in his step-father's life by reason of the connection,[401] nor in his step-father's father's life.[402]

§ **1067. Grandparent and Grandchild—Life.**—A policy of insurance taken out by a grandfather in favor of his grandson, with whom he lives, is valid,[403] although a granddaughter has not, by virtue of the relationship, an insurable interest in her grandfather's life.[404]

§ **1068. Brother and Sister—Brother in law—Step-sister.**—The mere relationship of brother and sister, or of one brother to another, does not constitute an insurable interest,[405] although such policy has been declared prima facie valid, and only to be avoided by proof of such want of interest,[406] and the United States supreme court has declared that the relationship is a sufficient interest.[407] But a sister who is

[400] Stambaugh v. Blake (Pa. 1888), 15 Atl. Rep. 705; 19 Ins. L. J. 473.

[401] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324; 15 Atl. Rep. 439; 1 L. R. Annot. 238.

[402] Gilbert v. Moorse, 104 Pa. St. 74.

[403] Elkhart Mut. Aid etc. Assn. v. Houghton, 103 Ind. 286; 53 Am. Rep. 514.

[404] Burton v. Connecticut Mut. L. Ins. Co., 119 Ind. 207; 19 Ins. L. J. 75.

[405] Lewis v. Phœnix Mut. L. Ins. Co., 39 Conn. 100; Loomis v. Eagle L. Ins. Co., 6 Gray (Mass.), 376; Cammack v. Lewis, 15 Wall. (U. S.) 643.

[406] Lewis v. Phœnix Mut. L. Ins. Co., 39 Conn. 100.

[407] Ætna L. Ins. Co. v. France, 94 U. S. 561. "As between brother and sister or other near relations desirous of thus providing for each other, and, as said by Chief Justice Shaw, presumed to be actuated by 'considerations of strong morals and the force of natural affection between near kindred, operating more efficaciously than those of positive law' (Loomis v. Eagle L. Ins. Co., 6 Gray (Mass.), 399), the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground we hold that whereas in this case a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangements they choose to make between them about the

a creditor of her brother has an insurable interest.[408] So a single woman, dependent on her brother for her support and education, has a sufficient interest in his life to entitle her to insure it.[409] A brother in law or person whose life is insured to whom the policy is payable, and who pays the premiums as agent of the insured, has a sufficient interest, it seems, to enable him to recover the entire amount of the policy, although it contains a condition that policies made payable to "persons not belonging to the family of the person whose life is insured are subject to proof of interest, and the company will pay upon such policies no greater sum than the amount or value of such interest." [410] And where the plaintiff had promised to help, care for, and support a child of a step-sister, it was held that an insurable interest existed in the child's life sufficient to warrant a recovery of the whole amount of the policy, in the absence of any objection on the part of the defendant as to the actual expenditures incurred in the child's behalf.[411]

§ 1069. Uncle and Nephew—Aunt and Nephew.—Neither uncle nor nephew have an insurable interest in the other's life by force merely of the relationship, and a policy of insurance procured by an uncle in his own favor upon the life of his nephew, in which he has no pecuniary interest, is void;[412] nor does the relationship of nephew and aunt constitute an insurable interest.[413] If insured takes out an accident policy himself, and pays the premiums, a nephew, who is the payee of an accident policy in case of an injury resulting in the death of the assured, need not, in case of such death, allege and prove an insurable interest in the life of insured.[414]

payment of premiums. The policy is not a wager policy": Per Bradley, J.: Id.

[408] Goodwin v. Massachusetts M. L. Ins. Co., 73 N. Y. 497.

[409] Lord v. Dall, 12 Mass. 115; 4 Am. Dec. 38.

[410] Forbes v. American M. L. Ins. Co., 15 Gray (Mass.), 249; 77 Am. Dec. 360.

[411] Berries v. London etc. L. Ins. Co. (Eng. C. A. Q. B. D. 1892), 1 L. R. Q. B. Div. 864.

[412] Singleton v. St. Louis Ins. Co., 66 Mo. 63; 27 Am. Rep. 321.

[413] Corson's Appeal, 113 Pa. St. 438; 6 Atl. Rep. 213.

[414] American Employers' Liability Ins. Co. v. Barr, 16 U. S. C. C. A. 51; 68 Fed. Rep. 873. In this case the accident benefits were payable to insured except death resulted.

§ **1070. Cousin.**—It is held in Texas that an assignment by one of a policy on his own life to his cousin, an adult male, is void, for want of an insurable interest and as against public policy, although such assignee is a member of his family, dependent upon him for support, and agrees to pay the necessary assessments, and that the original beneficiaries can claim the money.[415]

§ **1071. Friend's Insurable Interest.**—A mere friend has no insurable interest in a regular life policy, even though he is voluntarily made the payee by the insured;[416] and in benefit societies or fraternal organizations, where the primary object is to benefit certain classes of persons, we have seen that the beneficiary must be within the specified classes; but if it is apparent from the entire contract in associations of this character that the member is not restricted in his designation of beneficiaries, it would be a question whether the person designated need have any insurable interest, and if not, then a friend might be designated. This point has, however, been considered elsewhere.[417]

§ **1072. Religious Societies in Member's Life.**—A religious society, supported largely by voluntary contributions, has no insurable interest in the life of a member merely as such.[418]

§ **1073. Benefit Societies—Insurable Interest.**—The rights of members of a benefit society are determined by its contract with the members, which is the certificate, its articles of association and by-laws, statute of incorporation, and charter.[419] And the question of insurable interest must be governed largely by the fact how far such by-laws and contract

[415] Price v. Supreme Lodge Knights of Honor, 68 Tex. 361; 4 S. W. Rep. 633.

[416] Caudell v. Woodward, 96 Ky. 646; 29 S. W. Rep. 614.

[417] See sec. 781, herein.

[418] Trinity College v. Travelers' Ins. Co., 113 N. C. 244; 18 S. E. Rep. 175.

[419] Union Mut. B. Assn. v. Montgomery, 70 Mich. 587; 14 West. Rep. 877.

relate to and govern the designation of beneficiaries. This question has, however, been fully considered under the chapters on beneficiaries.[420]

[420] See secs. 728, 744, herein.

TITLE VI.

PREMIUMS AND ASSESSMENTS.

(1179)

TITLE VI.

PREMIUMS AND ASSESSMENTS.

CHAPTER XXIX.

THE PREMIUM.

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SUBDIV. I. Premiums, Generally.

§ **1083. Premium Defined.**—The premium is the agreed price for assuming and carrying the risk.[1] In policies on the tontine or endowment plan of insurance, the premium paid is not only the agreed price for carrying the risk, but is said to

[1] "The premium is the price of the peril against which the insurer guarantees in case of accident to the subject insured. . . . .It is the cost of insurance. The word 'premium' comes either from the word 'præmium,' signifying 'price,' or from the word 'primo,' because formerly the premium was paid before all, and at the time of signing the policy": Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 1, p. 51. "The sum paid for undertaking the risk in a contract of insurance": Anderson's Dict. of Law, 803. The premium "is the stipulated sum in consideration of which the underwriter agrees to take

be very much like a deposit in the bank by a depositor, and that the relation between the parties is, therefore, not one of trustee and cestui qui trust, and that a court of equity cannot order an accounting on such ground.[2]

§ 1084. Premium or Rate Per Cent. Must be Expressed in Policy.—The amount or rate per cent of the premium must be expressed in the policy, or there must be some criterion by which the amount of premium may be ascertained.[3]

§ 1085. Premium and Conditions as Consideration.—The premium is all that is received by the underwriter, and is in fact the actual consideration by virtue of which the risk is assumed.[4] But the premiums must grow higher as the risk increases; for, as we have before noted,[5] the division and distribution of liability among a large number of persons subjected to like risks minimizes the loss, and the premium must be such that it will be safe for the company to insure, and not so large that the insured cannot afford to effect a policy; so that although the insurer may undoubtedly assume the risk without any conditions upon the assured, the premium being the sole consideration, nevertheless it is for the benefit of all parties concerned that the risk be not increased during the term of the insurance. An increase of risk which is substantial and con-

upon himself the risk of loss, and to indemnify the assured against it": 1 Arnould on Marine Insurance, Perkins' ed. 1850, p. 6; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 1100.

[2] Uhlman v. New York etc. Co., 109 N. Y. 421.

[3] See Pollock v. Donaldson, 3 Dall. (U. S.) 510; Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 2. p. 57, et seq.; Id., c. ii, sec. 7, p. 48. See, also, sec. 1088, herein.

[4] "The underwriter receives a premium for running the risk of indemnifying the assured": Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield, C. J. "The agreed consideration is called a 'premium' ": 1 Phillips on Insurance, 3d ed., sec. 2. "The consideration received therefor is denominated the 'premium' ": 1 Wood on Fire Insurance, 2d ed., 4. It is "the consideration in a contract of insurance": Anderson's Dict. of Law, 559. "The consideration is the premium": Bunyan on Life Assurance, 2d ed., 1. "The premium or price of the risk being the sole consideration," etc.: 1 Arnould on Marine Insurance, Perkins' ed. 1850, p. 7

[5] Sec. 17, herein.

tinued is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests.[6] And the fact that the conditions will be observed must necessarily influence the parties in fixing the cost of insurance or premium; for the contract depends essentially upon an adjustment of the premium to the risk assumed.[7] Therefore, the stipulations and conditions, the performance of which are agreed upon by the parties, are a part of the consideration, the nonobservance of which by the assured, or failure to perform the same by him, will release the insurer;[8] the indemnity contemplated being based not only upon the agreed rate of premium, but also upon the exact terms and conditions of the contract itself, or, as is said by the court in a Connecticut case: "The insurer undertakes, for a comparatively small premium, to guarantee the insured against loss or damage upon the exact terms and conditions agreed upon." [9]

§ 1086. Premium is of the Essence of the Contract. The premium is of the very essence of the contract, or, in other words, the premium paid by the assured and the peril assumed by the insurer are two correlatives, inseparable from each other. Their union constitutes the essence of the contract.[10] The premiums paid by the many exposed to like hazards constitute a fund for the indemnity contemplated, or for the payment of the sum stipulated.[11]

§ 1087. Premium not Due Unless Risk Attaches.—As the risk is also an essential element of the contract,[12] no pre-

[6] Kyte v. Commercial Union Assur. Co., 149 Mass. 114, per Allen, C. J.

[7] See Viele v. Germania Ins. Co., 26 Iowa, 9; 96 Am. Dec. 83; Kyte v. Commercial Union Assur. Co., 149 Mass. 114, per Allen, C. J.

[8] Kyte v. Commercial Union Assur. Co., 149 Mass. 114.

[9] Glendale Mfg. Co. v. Protection Ins. Co., 21 Conn. 19, per Ellsworth, J. See, also, Ostrander on Fire Insurance, ed. 1892, sec. 107, p. 255. Richards on Insurance, ed. 1892, 124, sec. 126.

[10] Per Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 1, p. 51. "If there be neither a premium stipulated nor implied, it is certain there is not the whole of the contract, or that it is a contract of quite a different kind from insurance": Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 11, p. 77. See, also, c. iv, herein.

[11] See sec. 17, herein.

[12] See. 16, herein.

mium is due unless the risk attaches, this being an implied condition.[13]

§ **1088. The Rate of Premium.**—The rate of premium should be so computed, and an adequate premium demanded, that the insurer can safely assume the risk and the assured may afford to insure. The stability and permanency of the company, and consequent protection of the assured, likewise necessitates this.[14] The manner of computation is, however, rather a question relating to the practical conduct of the insurance business than to the law of insurance, and will not be considered here.[15] But since the premium is the money consideration or price of the risk, the loss is paid with reference to the sum on which the premium is paid, in cases of fire and marine risks.[16] So the statutes of several states provide in fire risks for a return of the unearned premium in cases where insurance is in excess of the loss, and there may also be an agreement for the return of unearned premiums.[17] Where evidence is admitted, in behalf of the company, to show that the right of subrogation would affect the rate of premium, the insured may also introduce evidence to show that although the right of subrogation is released, reputable companies took risks at a lower rate of premium in similar cases.[18] But if a life policy is on its face of the class known as "participating," it may not

[13] See c. xxxv, herein; 1 Phillips on Insurance, 3d ed. 30, sec. 38; Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 1, p. 52; Tyrle v. Fletcher, Cowp. 666.

[14] "An equality is to be preserved between the premium paid the insurer and the peril for which he makes himself responsible. . . . . The premium, says Pothier, to be equitable, ought to be a fair price for the risks which the assurer assumes": Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 3, p. 57.

[15] See 13 Encyclopedia Britannica, title "Insurance," for a consideration of the question. In California, the statute provides that the policy must strictly specify rate of premium: Deering's Annot. Civ. Code Cal., sec. 2589.

[16] "The underwriter pays no loss except with reference to the sum on which he is paid premium; the whole sum, if the loss be total; some aliquot part of the sum if the loss be partial": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 7, 8; 2 Arnould on Marine Insurance, Maclachlan's ed. 1887, 928.

[17] See c. xxxv, herein.

[18] Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213; 15 S. E. Rep. 562.

be shown that the rate of premium was that fixed for another kind of policy by evidence of table rates of the company; it not appearing that the same were brought to the notice of the assured.[19]

§ **1089. Premium as Test of Amount or Character of Risk.**—The premium may be resorted to as a guide to discover the amount intended to be insured.[20] Thus, when above the regular rate, it may indicate that a greater than the usual risk was contemplated.[21] So the amount of the premium may afford a pretty sure index as to the intent of the parties with regard to the attachment of the policy on outward or homeward freight; as in case of a valued policy on freight "at and from one port to another, and at and from thence back to the original port," and if a premium is paid double that which would be demanded for the outward voyage, the freight to the full amount of the valuation is covered on each voyage.[22] It has been decided, however, that a premium in excess of the usual rates does not afford a ground for a presumption that material facts increasing the risk were known to the underwriter, and considered by him in fixing the rate.[22a] Mr. Phillips notices a case so holding, and says the ruling "may well be doubted," and that it does not appear that any general presumption could arise, and that the question is one for the jury in each case.[23] But the test of the materiality of a concealed fact is whether it would have enhanced the premium;[24] and evidence of a certain kind is admissible that certain facts, if known, would have influenced the rate of premium.[25] So

[19] Piedmont etc. L. Ins. Co. v. Young, 58 Ala. 476.

[20] Post v. Phœnix Ins. Co., 10 Johns. (N. Y.) 179.

[21] Franklin Ins. Co. v. Brock, 57 Pa. St. 184.

[22] Davy v. Hallett, 3 Caines (N. Y.), 16. See Bridges v. Hunter, 1 Maule & S. 15; Von Lindenau v. Desborough, 3 Car. & P. 353, per Lord Tenterden; Mackintosh v. Marshall, 11 Mees. & W. 116, and Freeland v. Glover, 7 East, 457, where the amount of the premium has afforded a test as to the parties' intentions, representations, etc.

[22a] Von Lindenau v. Desborough, 3 Car. & P. 353.

[23] 2 Phillips on Insurance, 3d ed., 683, sec. 2159. See, also, 1 Wood on Fire Insurance, 2d ed., 600, sec. 258.

[24] Boggs v. American Ins. Co., 30 Mo. 63.

[25] Hawes v. New England Mut. M. Ins. Co., 2 Curt. (C. C.) 229; Luce v. Dorchester Mut. Ins. Co., 105 Mass. 297; Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1.

that the rule would seem to be, that if the insurers prove the concealment of some material fact or circumstance, the contract must be avoided, and the question whether all the facts evidence such a concealment is for the jury, but that the fact that the premium is of a higher rate than usual in such risks may tend to show the character of the risk to be more hazardous or greater than usual, although it does not of itself afford a positive ground for the jury to infer such fact, or that the insurer was to assume a risk enhanced by facts concealed from and unknown to him.[26]

§ **1090. Agreement as to Rate Must Govern.**—The premium being of the essence of the contract, and one of the essentials necessary to be agreed upon in order to complete the contract,[27] the agreement of the parties as to the rate must govern, in the absence of fraud or mistake;[28] the contract is dependent upon the consideration, and the law will not, in the absence of fraud, inquire into the sufficiency of the latter, nor hold the contract invalid on the ground that it is not founded on a full or just consideration.[29] And this accords with the rule early stated by Emerigon: "The premium agreed upon by the parties between themselves must be taken to be a just one. . . . . If at the outset the nature of the risk has been fully declared, the insurers will not be permitted to dispute the payment of the loss under pretext of the smallness of the amount of the stipulated premium";[30] nor does the agent's mistake in charging too small a premium invalidate the policy.[31] And it is held that although the general rule is that

[26] See Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 3, p. 58; 1 Wood on Fire Insurance, 2d ed., p. 490, sec. 213, citing Franklin Ins. Co. v. Brock, 57 Pa St. 184.

[27] See c. iv, herein; also sec. 1086, herein.

[28] "We must necessarily look to and be governed by the agreements of the parties": Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 3, p. 57. See Rolker v. Great Western Ins. Co., 2 Sweeny (N. Y.), 275, noted in sec. 1093, herein.

[29] Viele v. Germania Ins. Co., 26 Iowa, 9; 96 Am. Dec. 83. See sec. 1100, herein.

[30] Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 3, p. 58.

[31] See Bunten v. Orient Mut. Ins. Co., 4 Bosw. (N. Y.) 254, 263. This case did not turn upon this point, however.

the parties must abide by their contract, and that the insurers cannot, where the contract does not so stipulate, increase the rate of premium, nevertheless if the by-laws confer that right, as in case of mutual companies, such by-laws are said to supersede the general rule.[32] But we would suggest that the by-laws do not supersede the general rule, for as a rule they constitute a part of the contract itself.

§ 1091. Discrimination as to Rates of Premium—Rebate of Premium.—Many of the states provide by statute against discriminations against colored persons; also, as to life risks or in favor of individuals, risks of the same class and of the same expectation of life as to the rate of premium charged, whether the same be effected directly or indirectly, and that no special favors or inducements to effect a life policy shall be offered by way of rebates of premium, or the like.[33] In Rhode Island, an agent may lawfully agree to

[32] Mutual Assur. Soc. v. Korn, 7 Cranch (U. S.), 396.

[33] "No life insurance company doing business in the state of Colorado shall make or permit any distinction or discrimination in favor of individuals, between insurants (the insured) of the same class and equal expectation of life, in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes. Nor shall any company, or any agent thereof, make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends, or other benefits to accrue thereof, or any valuable consideration or inducement whatever not specified in the policy contract of insurance," under penalty: 1 Mills' Annot. Stat. Col. 1891, p. 1341, sec. 2232. No discrimination or rebate of premium contract must be plainly expressed in policy, penalty: Gen. Stat. Conn. 1888, p. 624, sec. 2861; Gen. Laws, 1889, p. 74 (see Colo.). And discrimination against persons of African descent: Laws Del. Rev. Code, 1852, as amended 1893, p. 973 (Laws Del., chaps. 132, 273, vol. 19, see Colo.); 3 Starr & Curt. Annot. Stat. Ill. (Supp. 1885-92), p. 751; Myers' Rev. Stat. Ill. 1895 (Cothram's Notes), pp. 840, 840a, c. 73, secs. 63 a, 63 d see Colo.). Fraternal associations exempt: McClain's Annot. Code Iowa Supp. 1888-92, p. 92, secs. 1760 a, 1760 b. (see Colo.); Acts 1886, La., No. 82; Freeman's Supp. 1885-95; Stat. Me., p. 315 (5), secs. 1-3, c. 49 (see Colo.), citing State v. Schwarzschild, 83 Me. 261; Laws Md. 1890, pp. 275, 276, c. 254; Supp. Pub. Stat. Mass. 1882-88,

permit one whose life he has insured to retain a portion of the premium equal in amount to the agent's commissions, the consideration being that insured furnish him with the names of others whom he may solicit for insurance. Such act does not violate a statute prohibiting discrimination as to the premium or rates charged.[34]

§ 1092. Same Subject—Such Statutes Constitutional. Such statutes have been held to be constitutional, on the ground that the legislature of a state has power to regulate the business of life insurance within its borders.[35] And it is also held that so much of the statute as relates to a rebate of premium is constitutional, and although it makes the act of an agent in so doing a criminal offense, it is not an abridgment of the personal liberty or natural rights of such agent, and it is unimportant whether the company is a domestic or foreign

pp. 535, 545, secs. 68, 69, 109, c. 214 (see Colo.). And discrimination against colored persons: Howell's Annot. Stat. Mich. Supp. 1883-90, p. 3420, secs. 4244, b. (No. 171, June 20, 1889, p. 197); Laws Minn. 1895, p. 427, c. 175, sec. 66 (see Colo.); Id. p. 428, sec. 67. Black and white alike: Pub. Stat. N. H. 1891, p. 488, c. 171, sec. 8 (see Colo.); Laws N. J. 1895, p. 334, c. 168 (see Colo.); 2 Birdseye's Rev. Stat. Codes and Laws N. Y., p. 1619, sec. 224 (see Colo.), vol. 6 (Collins); Supp. to 8th ed., Rev. Stat. N. Y., as amended to 1893, p. 4235, sec. 89; and Id. sec. 90. "Discriminations against colored persons": Hamilton's Stat. Rev. Laws N. Y. Ins. Co.'s, 1892, amended 1893-94, pp. 49, 50, secs. 89, 90; 1 Chauque's Rev. Stat. Ohio, 6th ed., p. 906 (secs. 1, 2), secs. 3631, 3632; tit. 11, c. 10 (see Colo.). Life or endowment insurance: Id. (secs. 1-3), secs. 3633, 3634. Discrimination against persons of African descent forbidden: 1 Smith & Benedict's Rev. Stat. Ohio, 3d ed., p. 1038 (secs. 1-3), secs. 3631-3633 (secs. 1, 2), 3634, 3635; Brightly's Purd. Dig. Pa. Supp. 1885-91, p. 2528, secs. 6, 7 (see Colo.); 1 Pepper & Lewis' Dig. Pa., pp. 2381, 2382, sec. 84; Pub. Laws, 1889, c. 116, secs, 1, 2; Amended Laws Pa. 1895, pp. 430-32, No. 308; Gen. Laws R. I. 1896; tit. 19, c. 183, secs. 1, 2 (see Colo.); Id., sec. 3. Not to affect existing contracts: Vt. Stat. 1894, p. 759, tit. 28, c. 178, sec. 4218 (see Colo.); Acts W. Va. 1891, p. 322, c. 108 (see Colo.); Laws Wis. 1891, pp. 327, 328, c. 267 (see Colo.); Laws Wyo. 1890-91, pp. 402, 403, c. 101 (see Colo.).

[34] Quigg v. Coffey, 18 R. I. 757; 30 Atl. Rep. 794; Pub. Laws R. I., c. 671, sec. 1.

[35] People v. Formosa, 131 N. Y. 478; 61 Hun (N. Y.), 272; 43 N. Y. St. Rep. 654; 40 N. Y. St. Rep. 861; 30 N. E. Rep. 492; Commonwealth v. Morning Star, 144 Pa. St. 103; 21 Ins. L. J. 88; 22 Atl. Rep. 867.

one.[36] In this connection the following is important: "The main point, however, upon which . . . . defendant relies . . . . is, that the act making it a criminal offense for him to pay a rebate to induce any person to effect insurance in the company, was unconstitutional, in that it arbitrarily and unjustly abridged his natural rights and personal liberty in the conduct of his business. He claims that the act has no relation to the public safety or welfare, and hence that it could not be enacted under the police power, which the state, through its legislature, can exercise. . . . . It is competent for the legislature, in the interest of the people and to promite the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection to policy holders which they could not secure for themselves. . . . . There should be a wide range of legislative power to promote the public welfare in the exercise of the police power, and the true boundaries of that power it would be difficult, in such a case, to prescribe. . . . . The business of life insurance in this state is mainly carried on by insurance companies authorized by law, and minute provisions are made regulating their incorporation and their business; and a department of the state government has been constituted to supervise them. The corporations organized under the laws of this state are absolutely under the direction and control of the legislature. It may specify how and on what terms they may do business, and enact laws regulating their conduct and the conduct of their agents for their protection and the protection of their policy holders, and enforce obedience to such laws by such penalties, forfeitures, and punishments as it may, within constitutional limits, prescribe. As all these corporations must act through agents, it has the same authority to regulate the conduct of their agents as it has to regulate the corporations themselves. It would be preposterous to say that the legislature could, in the exercise of its legitimate authority, regulate these corporations and prescribe the terms under which they may exist and do business, and yet could not by

[36] People v. Formosa, 131 N. Y. 478; 61 Hun (N. Y.), 272; 43 N. Y. St. Rep. 654; 40 N. Y. St. Rep. 861; 30 N. E. Rep. 492.

similar laws regulate and control the conduct of their agents. . . . . The fact that this company was a foreign corporation can make no difference. When it comes into this state by comity to do its business here through its agents, it must obey our laws and conform to our public policy, and if they are unwilling to do so, they must keep out of the state." [37]

§ 1093. Premium to Cover Additional Risks—Augmentation or Diminution of Premium.—An insurance may be effected at a nominal rate per cent, the policy to cover such other risks as may be approved and indorsed thereon, the premium on each risk to be fixed at the time of indorsement, with additions and reductions to conform to the company's rates when the time of sailing and character of the vessel shall become known;[38] or, in case of an insurance on a vessel for a certain time, "as interest shall appear," the premium may be augmented or diminished according to the actual cargo on board from time to time during the period covered.[39] And in cases of fire risks, the policy may provide for an additional premium if the premises are used for certain purposes, or if certain prohibited articles are kept.[40] So in life policies additional risks are taken upon payment of an additional premium. But where the additional risk was accepted by the

[37] Id. 482-84. Opinion of Earl. C. J. As to right to rescind a contract in case of refusal to allow rebate, see Thompson v. New York L. Ins. Co., 21 Or. 466; 28 Pac. Rep. 623. Neither the agent's authority to make the rebate nor a ratification by the company was established in this case, and the point whether the premiums could be recovered was considered. New York L. Ins. Co. v. Statham, 93 U. S. 30; McKee v. Phœnix Ins. Co., 28 Mo. 383; 75 Am. Dec. 129; Hedden v. Griffin, 136 Mass. 229; 49 Am. Rep. 25; Fisher v. Hope M. L. Ins. Co., 69 N. Y. 161; Norton v. Gleason, 61 Vt. 474, were noted, but it was deemed "doubtful whether the question can be raised under the pleadings," per Lord, J., pp. 488-90. See sec. 329, herein.

[38] Rolker v. Great Western Ins. Co., 2 Sweeny (N. Y.), 275. See 1 Phillips on Insurance, 3d ed., sec. 502.

[39] Pollock v. Donaldson, 3 Dall. (U. S.) 510. Emerigon speaks of the custom then existing in France to stipulate as to premium augmentation or reducible in times of war: Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 2, p. 57; secs. 4, 5, pp. 59-67.

[40] See O'Neill v. Buffalo F. Ins. Co., 3 N. Y. 122, where the policy was conditioned to be void if the building was used for any purpose specified in certain annexed special rates of insurance.

insurer, "upon the prior payment any year of an additional premium," and one such additional premium was paid, the policy was held to be forfeited by the continuance in the condition of extra risk by the insured for more than the term for which additional premium had been paid without payment of another additional premium.[41] In a case in New York of the character of that first instanced, the company refused to approve or indorse the risk on application, and an action was brought to recover the loss. The answer set up a counterclaim to the demand for a premium on the risk. In support thereof it was endeavored to prove a parol agreement at the time of effecting the policy; that under the circumstances, had they been known, no prudent insurer would have assumed the risk, and such evidence was held inadmissible, as was also evidence of what would have been a fair and usual rate of premium under the circumstances, or the market rate, and that no rate in use was applicable to the risk.[42]

SUBDIV. II. Premiums—Payment. Forfeiture, and Tender—Liens.

§ **1097. Payment of Premium—Generally.**—The premium being the cost or price of the insurance, and of the essence of the contract, it is necessary that it be paid in accordance with the terms and stipulations thereof, or that a liability should attach therefor, even though the actual payment be postponed.[43] Credit is usually given on marine insurance, the premium being generally paid by a note, and the policy conditioned that the amount of the note shall if unpaid be deducted in case of loss. The premium may be payable in one sum, or, as in case of life risks, in one entire sum or a succession of periodical installments due annually or otherwise, as agreed, in which case the nonpayment of such installments at the specified times will or will not forfeit the policy according to circumstances and the exact stipulation of the contract. There are many exceptions which justify a departure from the rule requiring payment when due. Thus, usage,

[41] See Ayre v. New England Mut. L. Ins. Co., 109 Mass. 430.

[42] Rolker v. Great Western Ins. Co., 2 Sweeny (N. Y.), 275.

[43] Deering's Annot. Civ. Code Cal., sec. 2616, provides that the insurer is entitled to the payment of the premium as soon as the thing insured is exposed to the peril insured against.

custom, or a course of dealing between the parties, the stipulations of the contract itself, a waiver, or circumstances may warrant a delay in payment; or nonforfeiture may be provided for by statute or by the policy; or a note may be accepted for the premium with no proviso for forfeiture in case of its nonpayment at maturity. By practice the payment should be in money or cash, but it may be, and frequently is, stipulated or agreed otherwise, as in marine risks or mutual companies, where premium notes are taken, and in fact any mode of payment agreed upon by the parties and accepted as sufficient is good and valid, although the policy provide otherwise, and this rule applies to the agent of the insurer, who has the requisite authority to so act;[44] for the parties may make any agreement which does not violate the essence of the contract nor prohibitory enactments.[45] Thus, credit may be given or payment be made by check, by note, by an order on third persons, or in depreciated funds, or the contract may be completed and the company bound, even though no cash or note be given for the premium nor the policy delivered.[46] It is well settled that an insurance company may make a valid contract by itself or its authorized agent, without exacting payment of the premium.[47] We have considered in another part of the work the question of prepayment of premiums, and whether payment is necessary to complete the contract.[48]

[44] Mr. May says: "When no special mode of payment is stipulated for, any mode of payment which is accepted without objection on the part of the insurers or their agent will suffice": 2 May on Insurance, 3d ed., sec. 345. Whether this learned writer intended by the words "when no special mode of payment is stipulated" to limit the general rule, or the words were inserted merely by reason of the word "agent," is not apparent; probably the latter was intended, as the rule above given by us in the text is fully supported by the authorities. There is no doubt as to the right of the company to waive such stipulation.

[45] Beadle v. Chenango Co. Mut. Ins. Co., 3 Hill (N. Y.), *161. This also accords with the rule early stated by Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 6, p. 68.

[46] Warren v. Ocean Ins. Co., 16 Me. 439. See the preceding and following sections in this chapter for authorities covering the above general propositions.

[47] Boehm v. Williamsburgh Ins. Co., 35 N. Y. 131; Goit v. National Prot. Ins. Co., 25 Barb. (N. Y.) 189.

[48] Secs. 70-73, herein.

§ 1098. No Forfeiture for Nonpayment of Annual Premium Unless so Agreed—Whether Premium or Debt. In life risks the nonpayment of the annual premium when due will not operate to effect a forfeiture, unless it is so agreed, or unless payment is made a condition precedent to the continuance of the contract. In such case the company is liable in case of loss, and it is held that the annual payment must be enforced by action as a debt. If the first premium is not paid, and the risk has attached, it is a debt collectible as such. But if the annual premiums be made payable in advance, they are not a debt, although the premium may in some cases be enforceable as a debt by the insurer, independent of the forfeiture.[49] Thus it is said: "It (the company) could not have sued and recovered from him that or any subsequent year's premium, its remedy was provided against the insured by the forfeiture of all his moneys previously paid and rights under the policy."

[49] Woodfin v. Ashville Mut. Ins. Co., 6 Jones Law (N. C.), 558. It was held in a policy on the life of a slave that it did not require payment of the annual installment, as condition of liability of the insurer; that failure to pay did not forfeit the right to insurance money for a loss: Worthington v. Charter Oak L. Ins. Co., 41 Conn. 372; 19 Am. Rep. 495. The company's liability for loss was conditioned in the policy upon payment of annual premiums, and it was held that such payment was a condition precedent to the company's liability; that the payment of the first premium entitled the assured to insurance for the following year, with his option to make further payments and receive corresponding insurance; but that there was no obligation to make further payments of premiums—that they did not in any sense constitute a debt. American Ins. Co. v. Klink, 65 Mo. 78, was a case where the failure to pay any installment on a premium note when due suspended the policy during the default, but where a payment of the note, whether voluntary or enforced, revived the policy, and the company was entitled to recover the full amount of the note under the charter, the whole note became due upon failure to pay any installment: Kansas Prot. Union v. White, 36 Kan. 700. There was no stipulation in this case that the failure to pay when due a note given for membership should avoid the policy, and after the note became due, the time for payment was extended, and it was held that there was no forfeiture for nonpayment when first due: Goodwin v. Massachusetts Mut. L. Ins. Co., 73 N. Y. 480. Here the policy stipulated for forfeiture in case of nonpayment of the premium or note when due, and providing for ascertaining the net value of the policy. The statute provided for the continuance and validity of the policy for a limited period after failure to pay the premium, and for ascertaining

In this case the premium was payable each year in advance, or the policy was to be forfeited.[50] There is, however, a distinction between a premium and a debt in cases where the policy stipulates that it be forfeited if the premium is not paid. The premium as it becomes due is not a debt. The fact that it is payable annually or semiannually, or at any other stipulated time, does not of itself constitute a promise to pay, either express or implied. In case of nonpayment, the policy is forfeited, except so far as the forfeiture may be saved by agreement, by waiver, estoppel, or by statute. The payment of the premium is entirely optional, while a debt may be enforced at law, and the fact that the premium is agreed to be paid is without force in the absence of an unqualified and absolute agreement to pay a specified sum at some certain time. In the ordinary policy there is no promise to pay, but it is optional with the insured whether he will continue the policy or forfeit it. If, under such policy, he ceases to pay at the end of a specified period, the policy determines, and the insured has no further claim, except such as a statute for nonforfeiture or some agreement, waiver, or estoppel may give, and in such cases he has an option to avail himself thereof or not. But in case the policy attaches and the premium is earned, and the risk carried on the strength of a credit arising either expressly or impliedly, or if a note or other binding obligation is given acknowledging an indebtedness, and binding the insured to pay, an enforceable debt exists.[51] So the contract may provide for liability after forfeiture.[52]

what that period was to be, and also that "after deducting from such net value any indebtedness to the company or notes held by the company against insured," and it was held that unpaid premiums were not an indebtedness within the meaning of the statute, and could not be deducted from the net value of the policy in determining the amount of premium for temporary insurance.

[50] Mutual B. L. Ins. Co. v. French, 30 Ohio St. 240; affirming 2 Cin. Sup. Ct. Rep. 321, per the court. See next section. See sections as to liability on premium note and assessment after forfeiture.

[51] Goodwin v. Massachusetts Mut. etc. Ins. Co., 73 N. Y. 780, and see cases cited by counsel in this case; Worthington v. Charter Oak Ins. Co., 41 Conn. 416. See cases under first note in this section.

[52] See c. xxxii, herein, as to assessments.

§ 1099. Whether Payment Condition Precedent.—In contracts of marine and fire insurance the payment of the premium is not generally made a condition precedent to the validity of the contract. But in contracts of life insurance, providing for the payment of premiums after the first in periodical installments, it is, as a rule, provided that nonpayment of the premium when due shall effect a forfeiture. The contract is absolute on the part of the insurer, conditioned on the payment of the premium. It is optional with the assured whether he will continue to pay and keep his contract in force or not. If he ceases to perform his part of the contract, it is ended, although, as stated in the last section, the premium or assessments may in some cases be collected even after forfeiture. Therefore, where a life policy provides that it may be continued in force provided the premiums be thereafter paid on or before a specified day's payment, it is generally held to be a condition precedent to the continuance of the contract; [53] but it is not a condition precedent unless so provided.[54] And it is declared in a New Jersey case to be a condition sui generis, and not of the nature of a condition precedent to the vesting of a right; [55] while in a United States case it is declared to be a condition subsequent.[56] In mutual companies it is requisite that all premiums be paid promptly when due, or their payment sufficiently secured in order to insure the permanency and stability of the company, and, as a necessary consequence, the better protection of the insured. Therefore the clause providing for prompt payment, when due, of such premium or a forfeiture of the policy is of the substance of the contract, and to warrant a continuance of the interest of the assured in the funds out of which the losses are to be paid, a strict compli-

[53] Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276; 19 Abb. Pr. (N. Y.) 217; 3 Rob. 232; Worthington v. Charter Oak L. Ins. Co., 41 Conn. 399, per the court; Hudson v. Knickerbocker L. Ins. Co., 28 N. J. Eq. 167. See Insurance Co. v. Twining, 12 Kan. 475; Mutual L. Ins. Co. v. French, 30 Ohio St. 240; 2 Cin. Sup. Ct. Rep. 321, per Wright, J.

[54] See last section.

[55] Mutual etc. Ins. Co. v. Hillyard, 37 N. J. L. 44.

[56] New York L. Ins. Co. v. Statham, 93 U. S. 24, 30, per Bradley, J. And see sec. 1102, herein.

ance with the assumed obligations of the assured to contribut to them is necessitated.[57]

§ **1100. Conditions as to Payment of Premium Valid.** Conditions in policies as to forfeiture for nonpayment of premium on a specified day or within a specified time are valid and enforceable.[58] Thus, a stipulation in a fire policy providing that unless the premium is paid within a certain time the insurer shall be discharged, is valid, and a demand of performance by the company is not required before cancellation.[59] Emerigon says that an agreement is lawful that the premium shall be paid at certain specified times in advance, and that the insurance shall be rescinded if the premium is not paid at the agreed upon time.[60]

§ **1101. Whether Contract Entire When Premium Entire.**—Although the subject of insurance consists of several distinct and wholly independent items, the contract is nevertheless entire if the premium is paid in gross, or is single and entire;[61] and where the premium is a gross sum, the contract is not severable, though the amount of insurance on the different items is fixed in the policy,[62] or separate;[63] nor, as a general rule, though the voyage consists of several passages,[64] nor though the property is separately valued and a gross premium paid.[65]

[57] See argument of Gholson, J., in Robert v. N. E. Mut. L. Ins. Co. 1 Disn. (Ohio) 355; argument of Storer, J., 2 Disn. (Ohio) 106.

[58] Watrous v. Mississippi Valley Ins. Co., 35 Iowa, 582.

[59] Redfield v. Patterson F. Ins. Co., 6 Abb. N. C. (N. Y.) 456.

[60] Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 7, p. 71. See, also, Equitable Ins. Co. v. McLennan (Tenn.), 6 Ins. L. J. 124. See sec. 1097, herein.

[61] Bowman v. Franklin F. Ins. Co., 40 Md. 620; Gottsman v. Pennsylvania Ins. Co., 56 Pa. St. 210; 94 Am. Dec. 55; Lovejoy v. Augusta Ins. Co., 45 Me. 472; McQueeny v. Phœnix Ins. Co., 52 Ark. 257; 12 S. W. Rep. 498; 5 L. R. Annot. 744; Trustees F. Assn. v. Williamson, 26 Pa. St. 196.

[62] Garver v. Hawkeye Ins. Co., 69 Iowa, 202.

[63] McGowan v. People's Mut. F. Ins. Co., 54 Vt. 211; 41 Am. Rep. 843.

[64] Bermon v. Woodbridge, 2 Doug. 781. See c. xxxv, herein, as to return of premium.

[65] Barnes v. Union etc. Ins. Co., 51 Me. 110; Trustees F. Assn. v. Williamson, 26 Pa. St. 196.

But the contract has been held severable where there are distinct items at different rates, or even where the premium has been in gross, or single and entire, and in such case the whole policy is declared not forfeited by a breach of warranty or condition, but that such breach affects that portion only of the property to which it relates.[66] There is, however, an apparent conflict on this question, and it will be more fully considered hereafter.

§ 1102. Whether Life Contract Entire or from Year to Year.—It is said that a contract of life insurance wherein the premiums are payable annually, subject to forfeiture for nonpayment thereof, is merely an insurance for a single year with a right to continue the same.[67] So in a Pennsylvania case it is declared that a policy of life insurance is really a contract for an insurance for one year, in consideration of an advance premium, with the right of the assured to continue it from year to year upon payment of the premium as stipulated, and that the assured is not bound to pay anything, and may drop his policy at the end of any one year.[68] So in a Georgia case it is held to be a contract from year to year only;[69] and in another case in the same state the court says: "The contract is from year to year, and dependent for its continuance upon the payment of the premium" on or before the day stipulated. "This is necessarily the duration of the contract, because of the express declaration that if the premium is not paid on or before that day in every year, the company shall not be liable, and the policy shall cease and determine."[70] But in a case in the United States supreme court it is declared that a policy of life insurance which stipulates for the payment

[66] Merrill v. Agricultural Ins. Co., 73 N. Y. 459; 29 Am. Rep. 184; Clark v. N. E. Mut. F. Ins. Co., 6 Cush. (Mass.) 342; Schuster v. Dutchess Co. Ins. Co., 102 N. Y. 260; Hartford F. Ins. Co. v. Walsh, 54 Ill. 164; 5 Am. Rep. 115.

[67] Worthington v. Charter Oak L. Ins. Co., 41 Conn. 399, per Carpenter, J.; Mutual B. L. Ins. Co. v. French, 30 Ohio St. 240; affirming 2 Cin. Sup. Ct. 321, per Wright, J.

[68] Mutual L. Ins. Co. v. Girard L. Ins. Co., 100 Pa. St. 172, 180.

[69] Dillard v. Manhattan L. Ins. Co., 44 Ga. 119.

[70] Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534.

of an annual premium by the assured, with a condition to be void on nonpayment, is not an insurance from year to year like a common fire policy, but the premium constitutes an annuity, the whole of which is the consideration for the entire assurance for life, and the condition is a condition subsequent, making by its nonperformance the policy void.[71] So in Tennessee it is held an entire contract of insurance for life subject only to discontinuance or forfeiture, not merely a contract from year to year, and therefore, if no consideration forms the basis thereof, representations by the officers of the company subsequent to the original contract would not be binding.[72] So the renewal of a policy without any new application rests upon the same basis as the original contract,[73] and a receipt given for the annual premium, and which recites that the policy is continued for another year, does not constitute a new contract, but merely continues in force the old one.[74] It is also held in a recent case in New York that where a society promises to renew and extend the insurance each successive year provided that certain mortuary premiums, etc., be paid, that the insurance is for life, conditioned only that the assured pay the premiums as stipulated.[75] So in another case in that state it is held that in a stock company the annual payment is not for a year's insurance only, but that an agreement exists that the company will keep the policy in force and receive subsequent premiums as they become due, and will observe in this respect their contract obligations under the act creating the company; that it will also keep on hand the necessary funds to meet such obligations, and, in case of insolvency, it is liable in damages for a breach of its contract to its policy

[71] New York L. Ins. Co. v. Statham, 93 U. S. 24, 30.

[72] Knickerbocker L. Ins. Co. v. Heider, 8 Lea (Tenn.) 488.

[73] Witheral v. Maine Ins. Co., 49 Me. 200.

[74] Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Pritchard v. Merchants & Tradesmen's Mut. L. Assur. Soc., 3 Com. B., N. S., 622, per Williams, J.

[75] McDougall v. Providence Saving L. Assur. Soc. of New York (N. Y. S. C. 1892), 19 N. Y. Supp. 481. See, also, Manhattan L. Ins. Co. v. Warwick, 20 Gratt. (Va.) 620; Hodsdon v. Guardian L. Ins. Co., 97 Mass. 144; Mutual B. L. Ins. Co. v. Hilliard, 37 N. J. 444; Willcutts v. Northwestern Mut. L. Ins. Co., 81 Ind. 300.

holders.[76] It will be seen, therefore, that the authorities are not unanimous on this question. There is much force, however, in the argument of the court in the United States supreme court case above referred to in this section,[77] where it is said substantially that the amount of the premium is based upon the duration of human life; that the value of assurance for one year on a man's life, when young and healthy, is not the same as when he is old and decrepit; and, therefore, the annual premium bears no relation to a year's insurance, as it is not computed on that basis.

§ **1103. Failure to Pay Premium on Day Stipulated Forfeits.**—If the policy provides that the premium shall be paid on or before a stipulated day or the policy shall become forfeited and void, or that the company shall be released from all liability, time becomes of the very essence of the contract, and a failure to pay as agreed determines the contract,[78] unless there be a waiver or estoppel; [79] and so even if the premium is tendered on the next day.[80] Thus it is said by the court in an Ohio case: "I had never supposed that there could be any doubt but that from the very nature of the contract

[76] People v. Security L. Ins. Co., 78 N. Y. 114; 7 Abb. N. C. (N. Y.) 198.

[77] New York L. Ins. Co. v. Statham, 93 U. S. 24, 30, et seq.

[78] Mobile L. Ins. Co. v. Purcett, 74 Ala. 487; Bergson v. Builders' Ins. Co., 38 Cal. 541; Phœnix L. Ins. Co. v. Sheridan, 8 H. L. Cas. 745; affirming 1 El. B. & E. 156; Security L. Ins. Co. v. Gober, 50 Ga. 404; Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Chicago L. Ins. Co. v. Warner, 80 Ill. 410; Franklin L. Ins. Co. v. Sefton, 53 Ind. 380; Williams v. Washington L. Ins. Co., 31 Iowa, 541; Knickerbocker L. Ins. Co. v. Dietz, 52 Md. 16; Shaw v. Berkshire L. Ins. Co., 103 Mass. 254; Ayre v. New England Mut. L. Ins. Co., 109 Mass. 430; Ashbrook v. Phœnix Mut. L. Ins. Co., 94 Mo. 72; 3 Mo. (L. ed.) 907; 12 West. Rep. 613; Holly v. Metropolitan L. Ins. Co., 105 N. Y. 437; Fowler v. Metropolitan L. Ins. Co., 26 N. Y. St. Rep. 770; 5 L. R. Annot. 805; 22 N. E. Rep. 576; Attorney General v. Continental L. Ins. Co., 93 N. Y. 70; Catoir v. American L. I. & Trust Co., 33 N. Y. 487; Robert v. N. E. Mut. L. Ins. Co., 1 Disn. (Ohio) 355; 2 Disn. (Ohio) 106; Kellner v. Mutual L. Ins. Co. (U. S. C. C. N. J.), 43 Fed. Rep. 623; Klien v. New York L. Ins. Co., 104 U. S. 88; New York L. Ins. Co. v. Statham, 93 U. S. 24.

[79] See c. xxxiv, herein, on premiums, etc., waiver, and estoppel.

[80] Fowler v. Metropolitan L. Ins. Co., 116 N. Y. 389; 26 N. Y. St. Rep. 770; 5 L. R. Annot. 805; 22 N. E. Rep. 576.

of life insurance the prompt and punctual payment of the premiums was of the very substance of the contract." [81] It is true that forfeitures are odious in law, and will be enforced only where it is clear that the parties so intended by the stipulation,[82] but nevertheless contracts, when valid and not against public policy, will be enforced as made by the parties.[83] So in case a permission to navigate as mariner or officer between certain points on payment of an additional premium, which is paid the first year, the failure to pay such premium when due the second year avoids the policy.[84] So prompt payment of the premium is necessary, even though credit has been given by note; if the policy is so conditioned, payment when due of the note is requisite.[85] But if the consideration is the surrender of an existing policy, the fact that a premium is due and unpaid on such prior policy is immaterial in an action brought on the new policy;[86] and it is held that time of payment or performance is not of the essence of the contract where the insurers insert a memorandum in the policy that if payment is accepted after the stipulated day, it shall be considered an act of grace or courtesy, and will establish no precedent for future payment, as it tends to warrant the belief that payments would be accepted at other than the days specified.[87]

§ 1104. Equity will not Relieve from Forfeiture so Incurred.—In case the premium is not paid when due, in consequence of which a forfeiture is incurred under the conditions of the contract, equity will not grant relief.[88] Thus it is said in an Ohio case: "There can be no relief in case of its

[81] Robert v. N. E. Mut. L. Ins. Co., 1 Disn. (Ohio) 355, per Gholger, J.; 2 Disn. (Ohio) 106, per Storer, J.

[82] Helme v. Philadelphia L. Ins. Co., 61 Pa. St. 107, per Thompson, C. J.

[83] Alabama Gold L. Ins. Co. v. Thomas, 74 Ala. 578.

[84] Ayre v. New England Mut. L. Ins. Co., 109 Mass. 430.

[85] Robert v. N. E. Mut. L. Ins. Co., 1 Disn. (Ohio) 335; 2 Disn. (Ohio) 106.

[86] Kanticner v. Pennsylvania Mut. L. Ins. Co., 5 Mo. App. 581.

[87] Thompson v. Mut. L. Ins. Co., 52 Mo. 469.

[88] Klein v. New York L. Ins. Co., 104 U. S. 88; Hellner v. Mutual L. Ins. Co. (U. S. C. C. N. J.), 43 Fed. Rep. 623; Attorney General v. Continental L. Ins. Co., 93 N. Y. 70.

nonpayment on the day specified. The contract is of the description termed 'unilateral.' To have it continue from year to year is in the nature of a privilege secured by the agreement of the company. It may be waived or abandoned by the party, and the company has no right to thrust it upon him without his consent expressed in the mode and at the time appointed, and the very nature of the business of the company requires that they should know at the time whether their agreement is to continue. The principle upon which relief has been refused in the case of a privilege of purchase fully applies." [89]

§ **1105. Subsequently Enacted Nonforfeiture Statute —Payment of Premiums into Court.**—It is held in Massachusetts that a statute passed subsequently to the issue of the policy, and which provides for nonforfeiture, cannot be invoked to aid the assured in case of such forfeiture, although a certificate of receipt of annual premiums has been given since the passage of the act.[90] So a statutory enactment providing for the payment by the company into court of premiums as a condition to defending an action on the ground of misrepresentations, cannot apply to a policy issued prior to such enactment.[91] And an act for the incorporation of fire insurance companies which makes a personal demand necessary to a recovery of the amount of a premium note, as a penalty for neglecting to pay assessments thereon, does not affect notes given before the enactment of the statute.[92]

§ **1106. No Notice or Formal Declaration of Forfeiture Necessary.**[92a]—If there is an express provision for forfeiture in case of nonpayment of the premium on or before a specified day, and the time expires without payment or valid

[89] Robert v. N. E. Mut. L. Ins. Co., 1 Disn. (Ohio) 355, per the court; s. c., 2 Disn. (Ohio) 106.

[90] Shaw v. Berkshire L. Ins. Co., 103 Mass. 254; Mass. Stats. 1861, c. 186; Smith v. Mutual L. Ins. Co., 5 Fed. Rep. 582.

[91] Linz v. Massachusetts Ins. Co., 8 Mo. App. 363.

[92] Sands v. Lilienthal, 46 N. Y. 541, under N. Y. Laws, 1853, c. 466; repealed, c. 690, art. 10, sec. 290; Laws N. Y., Hamilton's Stat. Rev. p. 122.

[92a] See secs. 1332-1334, herein.

excuse for nonpayment, the policy thereupon becomes absolutely void at once, without notice of forfeiture or any action on the part of the company;[93] nor need a formal declaration of forfeiture for nonpayment of premiums when due be declared by the company when the policy stipulates for forfeiture for such nonpayment;[94] nor is it necessary for the company to make a declaration of forfeiture on its books.[95]

§ **1107. Premium Payable on Demand.**—If the premium is payable on demand, a demand is a condition precedent to forfeiture.[96]

§ **1108. Forfeiture for Nonpayment of Installments of Premium when Due.**—If the stipulation is that the annual premium shall be paid quarterly in advance upon specified days or the policy shall be forfeited, the party will be held strictly to the performance of such condition; and the contract will be determined by nonpayment as stipulated,[97] unless such condition is legally modified by the company.[98] And this is so even though it be subsequently provided in the contract that the payments for the year's insurance shall be known as the premium, and shall be due in advance at the commencement of each year;[99] and the rule obtains although the policy stipulates that if the assured shall pay the annual premium when due, the company shall be liable, and also that if the whole of the quarterly premium shall not have been paid when the assured dies, the company may deduct the whole un-

[93] Attorney General v. Continental L. Ins. Co., 93 N. Y. 70; Moses v. Brooklyn L. Ins. Co., 50 Ga. 196; Roehner v. Knickerbocker L. Ins. Co., 63 N. Y. 160.

[94] United States L. Ins. Co. v. Ross, 159 Ill. 476; 42 N. E. Rep. 859. But see c. xxxiv, herein.

[95] Ashbrook v. Phœnix Mut. L. Ins. Co., 94 Mo. 72; 3 Mo. (L. ed.) 907; 12 West. Rep. 613. But see c. xxxiv, herein.

[96] Pulling v. Travelers' Ins. Co., 55 Ill. App. 452.

[97] Werner v. Metropolitan L. Ins. Co., 11 Daly (N. Y.), 176; Catoir v. American etc. Ins. Co., 33 N. J. L. (4 Vroom) 487; Sheriden v. Phœnix L. Assur. Co., 8 H. L. Cas. 745; affirming 1 El. B. & E. 156; Want v. Blunt, 12 East. 183. But see c. xxxiv, herein.

[98] Catoir v. American etc. Ins. Co., 33 N. J. L. (4 Vroom) 487.

[99] Werner v. Metropolitan L. Ins. Co., 11 Daly (N. Y.), 176

paid balance of that year's premium from the amount of the policy.[100] So in case a note for the premium is payable in installments, it is declared that upon the nonpayment of an installment it is an overdue obligation given for the premium to the extent of that payment on the note, where the policy and note both provide for forfeiture of the policy in case of nonpayment of said note, and this was so held even though the premium was an annual one.[101] But if the policy provides for nonliability of the company if a loss occurs while the premium note is wholly or in part past due and unpaid, nonpayment operates in such case to effect a suspension.[102] Other cases hold that the nonpayment of an installment on such note incurs a forfeiture.[103] In all cases, however, of this or like character the intention of the parties, as derived from a fair and reasonable construction of the entire contract, must be carried out as near as possible, consideration being given to the principle that courts do not favor forfeitures, and also to the other principle that stipulations in regard to the payment of the premium are of the substance of the contract when made upon an adequate consideration.[104]

§ 1109. Company may Extend Time of Payment of Premium.—Inasmuch as the strict performance of the condition for the payment of the premium at the day specified is for the benefit of the company, it is optional with it whether performance be strictly insisted on and the policy determined, or whether the time for payment be extended, and such stipulation may be suspended the same as clauses for performance in any other contract, and this may be done by the authorized

[100] Sheriden v. Phœnix L. Assur. Co., 8 H. L. Cas. 745; affirming 1 El. B. & E. 156.

[101] Pitt v. Berkshire L. Ins. Co., 100 Mass. 500; citing Vinton v. King, 4 Allen (Mass.), 562. See c. xxxi, herein.

[102] Garlick v. Mississippi Valley Ins. Co., 44 Iowa, 553.

[103] See Yost v. American Ins. Co., 39 Mich. 531. And see further on this point of nonpayment of installments on premium note, c. xxxi, herein.

[104] See argument of the court in Pitt v. Berkshire L. Ins. Co., 100 Mass. 500; American Ins. Co. v. Story, 41 Mich. 385.

agent of the company as well as by the company itself.[105] So although the premium be payable quarterly on specified days, it may be subsequently agreed by parol that the payment be made at any time thereafter within a limited number of days, and such agreement does not conflict with the written contract,[106] and such extension of time of payment may arise as well impliedly as from an express agreement, or prompt payment may be waived or the company estopped to insist upon forfeiture,[107] but the extension of time of payment may be conditional, as in case that the premium be paid during the life of the assured, or that he is in good health.[108]

§ **1110. Extension of Time of Payment—Computation of Time.**—If the time of payment be extended a certain number of days after the premium actually becomes due, in computing the time covered by the extension the day on which the premium fell due is excluded from the computation.[109]

§ **1111. Acceptance of Entire Annual Premium in Advance.**—An agent may accept the payment of the entire annual premiums in advance and waive quarterly payments where he has authority to solicit applications and collect premiums.[110]

§ **1112. Prepayment of Premiums.**—Prepayment of premium may be a condition precedent to the attachment of the risk, as where the policy provides that it shall not take effect until the premium is paid. This is ordinarily so provided in life risks, although in fire and marine policies credit is fre-

[105] Mutual etc. Ins. Co. v. Hillyard, 37 N. J. L. 444; Palmer v. Phœnix Ins. Mut. L. Co., 84 N. Y. 63; Bonton v. American Mut. L. Ins. Co., 25 Conn. 542, per Storrs, C. J.; McCraw v. Old North State etc. Co., 78 N. C. 149.

[106] Kentucky Grangers' Mut. B. Soc. v. Adams (Ky. Sup. Ct. 1892), 13 Ky. L. Rep. 589.

[107] See c. xxxiv, herein, on premiums, excuses, waiver, and estoppel.

[108] Pritchard v. Merchants' & Tradesmen's Mut. L. Assur. Soc., 3 Com. B., N. S., 622.

[109] Campbell v. International L. Assur. Soc., 4 Bosw. (N. Y.) 298.

[110] Kerlin v. National Acc. Assn., 8 Ind. App. 628; 35 N. E. Rep. 39; 36 N. W. Rep. 156.

quently and customarily given,[111] and where credit is given for a limited time, provided that the premium must be paid within such a period, nonpayment as stipulated may be waived;[112] but an unauthorized payment by a third party is not sufficient to bind the parties, as it does not constitute an acceptance by the assured.[113] An agreement made with the company's general manager to consider the first premium paid by reason of work done for him by assured does not constitute a valid prepayment under a policy requiring payment of premiums in advance at the head office on or before the delivery of the policy; and this was so held even though the policy was delivered and the company's official receipt given to assured by said manager.[114]

§ 1113. Offset—Premium and Rents Due from Agent. A local agent and manager of the company who has issued a policy cannot offset the premium by rents due from him to the assured, nor by rents due assured for offices rented by the company.[115]

§ 1114. Part Payment of Premium will not Prevent a Forfeiture.—So far as the payment of a premium when due is concerned, the contract is indivisible, and a forfeiture is not prevented by part payment thereof;[116] nor it is held, will a forfeiture be waived by part payment after forfeiture,[117] and although part of the premium is paid, the company may

[111] Gidding v. Northwestern Mut. L. Ins. Co., 102 U. S. 108; Home Ins. Co. v. Field, 42 Ill. App. 392; 24 Chi. Leg. News, 122. Prepayment of premium, where credit was given by the agent and the assured had not received the policy and was ignorant of its provisions: Home Ins. Co. v. Field, 53 Ill. App. 119. This subject is considered under the chapter on agency herein.

[112] Bowman v. Agricultural Ins. Co., 59 N. Y. 521.

[113] Whiting v. Massachusetts etc. Co., 129 Mass. 240.

[114] Tiernan v. People's L. Ins. Co. (Ont. S. C. J. 1895), 14 Can. L. T. 277.

[115] Sullivan v. Germania L. Ins. Co., 15 Mont. 522; 39 Pac. Rep. 742.

[116] Willcutts v. Northwestern Mut. L. Ins. Co., 81 Ind. 300; Hudson v. Knickerbocker Ins. Co., 28 N. J. Eq. 167; Barnes v. Piedmont etc. Ins. Co., 74 N. C. 22.

[117] Garlick v. Mississippi Valley Ins. Co., 44 Iowa, 55.

where it reserves the right of cancellation, rescind the contract; especially where notice is given limiting the time of payment of the balance.[118] Nor will it even keep the policy in force for such a proportionate part of the new year as the sum paid bears to the whole premium.[119] So where the policy is suspended by failure to pay a note for the premium at maturity, an acceptance thereafter of a part of the premium due does not revive the policy if it is provided that on payment of the note the policy shall be revived, and the entire premium is not paid when the loss occurs.[120] The above rule is subject, however, to such exceptions as may arise by some agreement whereby the policy may be kept in force by part payment,[121] so a receipt of part of the premium after forfeiture has been held to constitute a waiver.[121a]

§ 1115. Nonpayment of Premium may Only Suspend Risk.—The risk is, under many insurance contracts, merely suspended by nonpayment of the premiums when due, being subject to revival on compliance with certain conditions or absolutely on payment. It is almost invariably stipulated in such cases, however, that the company shall not be liable if death or loss intervenes, but no premium is earned unless so provided,[122]

[118] Bergson v. Builders' Ins. Co., 38 Cal. 541.

[119] Hudson v. Knickerbocker L. Ins. Co., 28 N. J. Eq. 167; Willcutts v. Northwestern Mut. L. Ins. Co., 81 Ind. 300.

[120] Curtin v. Phœnix Ins. Co., 78 Cal. 619; 21 Pac. Rep. 370.

[121] Hudson v. Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

[121a] Hodson v. Guardian Ins. Co., 97 Mass. (1 Browne) 144. The court, per Gray, J., says in this case: "Although an agent of the company had no power to bind them by receiving payment of a premium note after it was due, the company might receive such payment at any time. If they received the amount of the note from their agent after it was due, they were bound to inform themselves of the time when it had been paid to him, and by receiving it from him without inquiry, they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy": Id. 148; Sims v. State Ins. Co., 47 Mo. 54, 62; 4 Am. Rep. 311, per Bliss, J., who said: "This is a case of forfeiture for a want of promptness in paying the premium note, and if the law does not forbid, it certainly will not favor, but rather lean against, such forfeiture."

[122] Garlick v. Mississippi etc. Ins. Co., 44 Iowa, 553; Hummel's Appeal, 78 Pa. St. 320; American Ins. Co. v. Klink, 65 Mo. 78; Jeliffe v.

although policies frequently stipulate that the full amount of the premium shall be considered earned in such cases.[123] So where a policy was conditioned that in case of the nonpayment of any installment on a note given for the premium, the contract should be void until payment, when the risk should revive, but that the company should not be liable for a loss intervening, it was held that during the period of suspension the insured was not chargeable with premiums.[124]

§ 1116. Death or Loss after Suspension—Payment of Premium.—If the contract provides for payment of the premium on or before a stipulated time, or if not paid that the risk shall be suspended, and no liability against the company shall attach until payment, or if the policy be conditioned for revival of the risk after forfeiture by payment of the premium, the company will not be liable nor the risk revived where the payment is not made until after loss or death occurs;[125] and if the premium be received, but in ignorance of the death, there is no payment.[126]

§ 1117. Payment of Overdue Premium after Loss, Death, or Sickness.—Payment of an overdue premium after death of the insured or loss, where the contract is stipulated to be forfeited in case of nonpayment of the premium when due, will not save the forfeiture, unless there be a waiver or an agreement which may be construed to have that effect, es-

Madison Ins. Co., 39 Wis. 111; 20 Am. Rep. 35; Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534; Matthews v. Insurance Co., 40 Ohio St. 135.

[123] Such stipulation was contained in the policy in Williams v. Albany City Ins. Co., 19 Mich. 451; 2 Am. Rep. 95; Cardwell v. Republic Ins. Co., 7 Chi. Leg. News, 282; Wall v. Home Ins. Co., 36 N. Y. 157; 8 Bosw. (N. Y.) 597. In Muhlman v. National Ins. Co., 6 W. Va. 608, it was stipulated that the note or obligation for the premium should be considered the premium for the risk terminated.

[124] Matthews v. American Ins. Co., 40 Ohio St. 135 (two judges dissenting).

[125] Wall v. Home Ins. Co., 36 N. Y. 157; Matthews v. Insurance Co., 40 Ohio St. 135; Pritchard v. Merchants' & Traders' Mut. L. Ins. Co., 3 Com. B., N. S., 622; 27 L. J. Com. P. 169.

[126] Pritchard v. Merchants & Traders' Mut. L. Ins. Co., 3 Com. B., N. S., 622; 27 L. J. Com. P. 169.

pecially where the death or loss is unknown to the insurer, or the payment is made under circumstances which amount to a fraud upon the company;[127] and in case of an express condition in the policy that the assurer shall not be liable on the policy or for a renewal except the premium be actually paid, a presumption exists that a payment after loss is too late, but acceptance may be proven.[128] So a payment after death where it intervenes between the neglect of the assured to pay a premium when due and a claimed waiver does not bind the company;[129] and where a policy is delivered to another to be delivered to the insured if he pays the premium within a given time, and the day after the loss the insured pays the same, which is accepted, but without knowledge of the loss, there is no waiver of prepayment.[130] But payment after death has been held good where the assured has been justified by a course of dealing with the company in believing that prompt payment would be waived.[131] So the company may refuse to receive an overdue premium tendered after the sickness of the assured who subsequently dies.[132] So in case of a material change in the health of the insured between the time of application and the transmission of the premium, conditioned on the payment of which the policy was to attach, it is his duty to notify the company of such fact, and a receipt of the premium transmitted the day the insured was taken sick is not a sufficient payment where death ensues from such sickness.[133]

§ 1118. Death or Loss within Time Extended for Payment or Days of Grace.—There has been some discussion

[127] Miller v. Union Cent. L. Ins. Co., 110 Ill. 102; Cardwell v. Republic Ins. Co. (U. S. D. C. Ill.), 7 Chi. Leg. News, 282; Williams v. Albany City Ins. Co., 19 Mich. 469; Sullivan v. Cotton States L. Ins. Co., 43 Ga. 423; Union Mut. L. Ins. Co. v. McMillan, 24 Ohio St. 67; Want v. Blunt, 12 East. 183; Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534, and opinion by Nisbet, J.

[128] Moore v. Rockford Ins. Co. (Iowa S. C. 1894), 57 N. E. Rep. 597.

[129] Simpson v. Accidental Death Ins. Co., 2 Com. B., N. S., 257.

[130] Home Ins. Co. v. Field, 42 Ill. App. 392; 24 Chi. Leg. News, 122.

[131] Mayer v. Mutual L. Ins. Co., 38 Iowa, 304.

[132] Catoir v. American L. Ins. & Trust Co., 33 N. J. 487.

[133] Whitley v. Piedmont etc. L. Ins. Co., 71 N. C. 480.

as to the effect of death or loss and payment thereafter of the premium within the time extended for payment, or within what are designated as "days of grace." It is held that death or loss must occur within the life of the contract to warrant a recovery.[134] It is also decided that a tender of payment of premium in full within a term of credit allowed is a sufficient compliance with the condition of payment to sustain an action on the policy.[135] Mr. Niblack says: "It is well settled that the insured can only take advantage of the days of grace at his own risk, and if he dies before actual payment, his beneficiary cannot recover"; but he cites no authorities.[136] And in one of the cases a distinction has been made between a provision that the assured shall pay and days of grace are given, and one where there is an extension of the time for payment.[137]

§ 1119. Review of Cases Generally Relied on as Holding Such Payment of No Effect.—In Want v. Blunt,[138] the requirement was for payment within fifteen days after due, subject to forfeiture, unless the insured, within six months thereafter, paid the premium with an additional rate for each month, when it should be revived, provided the insured was in as good health as when the policy expired. The insured died within the fifteen days, and the executor tendered the premium within said period, but it was refused, and the policy was held void. In another case the insurance was for one year, the consideration of which was to be paid within fifteen days from the date of the policy, but there was a condition that the company should not be liable until the premium was actually paid, and if not paid within said time, the policy should be void; a loss occurred within said period and payment was tendered, and it was held that the loss having occurred and the policy not having attached under the terms of

[134] Lockyer v. Offley, 1 Term Rep. 260, per Willis, J.

[135] Farnum v. Phœnix Ins. Co., 83 Cal. 246; 23 Pac. Rep. 869.

[136] Niblack on Mutual Benefit Societies, sec. 287, p. 315.

[137] Worden v. Guardian etc. Ins. Co., 7 Jones & S. (N. Y.) 317; 39 Sup. Ct. N. Y. 317.

[138] 12 East, 183.

the policy, the company might refuse the tender of payment of the premium.[139] Again, in Salvin v. James,[140] the policy provided that payment might be made within fifteen days after it became due and an advertisement, which was made a part of the contract, provided that the insurance should continue for fifteen days beyond the expiration of the policy, and a loss occurring within that period and a tender being subsequently made, but within the fifteen days, it was decided that the insurer might refuse if it so elected. So in a Georgia case[141] it was expressly decided that if a clause in the policy provided for forfeiture for nonpayment on the day when the premium became due, that it must be then paid or forfeited. A claim was raised that the time of payment had been extended thirty days by virtue of a clause in a prospectus issued by the company,[142] which claim was denied, but the court declared that even though it were held that there was an extension of time of payment for thirty days, such extension could not warrant a payment within such period of a premium after death for want of consideration in the contract. But it should be noted that the court says that if the company could have been liable at all in such case, the tender of the premium within the thirty days would have constituted a new contract upon the terms of the policy; for there was no provision which would have prevented a rejection of the tender if made in time. But Williams, J., in the Pritchard v. Merchants' etc. Society case,[143] argues: "Then it is said that the payment and acceptance of the premium created a new contract; but in truth it is no new contract at all; it was intended as a payment under the original contract."[144] The principal case cites Tarleton v. Stainforth,[145] which is substantially the same case as

[139] Bradley v. Potomac F. Ins. Co., 32 Md. 108.

[140] 6 East, 571.

[141] Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534.

[142] See secs. 192, 193, herein.

[143] 3 Com. B., N. S., 622.

[144] See Brady v. Northwestern Ins. Co., 11 Mich. 425, as to renewal being new contract.

[145] 5 Term Rep. 695; affirmed, 3 Anstr. 707.

that of Salvin v. James.[146] The next two cases have been so frequently discussed that the consideration of this question necessitates noting them. The case of Simpson v. Accidental Death Insurance Company[147] was as follows: The death occurred within the period of extension, which was twenty-one days. It was supposed that the premium had been paid. A few days prior to the expiration of said period, the company learned of the nonpayment, but said nothing until after the time had expired, so that in fact there was no actual payment or tender within the specified days of grace. One of the conditions of the policy was that it should be absolutely void if the premium was unpaid for the said twenty-one days after it became due, and it was upon this fact that the whole decision rested; for it was held that the nonpayment within the specified time forfeited the policy, it being declared that the defendant was not by its conduct estopped from denying payment, and had not willfully prevented a tender. Again, another factor upon which much stress was placed entered into the decision of this case and is important here, and that was, that the policy was so conditioned that the assured, had he been living, would not himself have had an absolute right to have kept the policy in force by payment or tender of the premium within the twenty-one days, for the directors, whenever a new premium became due, had the right of keeping alive or renewing the policy, or of refusing so to do at their pleasure. Much less, therefore, would the company have been obligated to have accepted payment or tenders by the executor after death of the assured, even if made. These were the main points of the case upon which it turned, but the court says that the contract was that he, the assured, should pay the premium within the twenty-one days, and not his executors after his death, and that payment meant such payment as provided for in the body of the policy. It is noteworthy, and gives rise to the impression that the policy was not framed in the utmost good faith, that there was also a condition that if the premium should from time to time be paid within said twenty-one days, the

[146] 6 East, 571.
[147] 2 Com. B., N. S., 257.

policy should "not be void," although the event upon the happening of which the policy was payable should occur before the expiration of said twenty-one days. That this case was not intended to decide the point as to the effect of payment after death within the days of grace is evident from the words of the court therein, as well as by the words of Byles, J., in a subsequent case,[148] who says: "I am not aware of any authority upon that subject except what fell from the court in the recent case of Simpson v. Accidental Death Company," and he adds that "it is unnecessary on the present occasion to pronounce any opinion upon that question." That the case wherein these words appear does not constitute an authority directly upon the question is undoubtedly the fact, since the policy was there conditioned to be forfeited if the premiums were not paid within thirty days after they became due, subject to revival within three calendar months upon satisfactory proof of good health. Although the death of the assured occurred within the thirty days, the premium was not paid until after the expiration of said time, and when received both parties were ignorant of the death. Therefore, it was held that the provision that the assured should be in good health contemplated that the subject of insurance should be a living person when the payment should be made, and that a waiver could not be based upon a receipt of the premium under such circumstances. In connection with the main question under consideration here, Williams, J., says: "The inclination of my opinion, if it be necessary to express one, and perhaps it is, for it has an important bearing on the case, is, that the thirty days are given only with reference to insurance for future years, and that notwithstanding that the life has become less valuable, the company are bound to go on insuring future years, provided the future premiums are paid within thirty days after the expiration of each period of insurance."

§ **1120. Cases Supporting Opposite View.**—In a case in the federal court the policy provided for a forfeiture if the

[154] Pritchard v. Merchants & Tradesmen's Mut. L. Assur. Soc., 3 Com. B., N. S., 622.

premiums were not promptly paid when due, but a custom existed to receive overdue payments, which custom was in effect an extension of time, and it was held that the company was estopped from claiming a forfeiture where a payment had been made after maturity of the premium within the time warranted by such custom, even though made after the death of the assured.[149] So in a New York case a policy of insurance was issued containing a provision that no insurance should be binding until the actual payment of the annual premium, but there was also an agreement that if payment at maturity was prevented, the policy should continue in force a reasonable time thereafter, and there was a usage to so receive the premiums. The assured paid the premiums for several years, but on a day when the annual premium was due, and while on his way to pay the premium, he was struck with paralysis, and died. Within a few days the premium was tendered by the wife of the assured and refused. It was held that the company was liable on the policy.[150] Again, it is decided that payment after death may be made within a period of thirty days after the premium is due if the policy allows that time.[151] So it is held that an absolute extension is not conditioned on the continued life of the insured.[152]

§ 1121. Same Subject—Conclusion.—An examination of the cases shows that the courts will construe the conditions so as to effectuate the intentions of the parties so far as is possible, having in view the validity of the stipulations and their reasonableness, and if the language of the policy is such as to warrant a construction that the company intended to continue it in force until the expiration of the period of extension, and to make itself liable, and that was the contract, then in case of payment within such days of grace or time of extension,

[149] Spoeri v. Massachusetts Mut. L. Ins. Co. (U. S. C. C. Mo.), 39 Fed. Rep. 752.

[150] Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276; 3 Rob. 232; 19 Abb. Pr. (N. Y.) 217; 4 Am. Rep. 675 (two judges dissented, however).

[151] Rogers v. Capitol L. Ins. Co., 1 Week. Not. Cas. 589; Worden v. Guardian etc. Ins. Co., 7 Jones & S. (N. Y.) 317.

[152] Homer v. Guardian Ins. Co., 67 N. Y. 478.

the policy will not be forfeited, even though the insured dies or a loss occurs prior to such payment.[153] But a payment after death does not save the policy where the construction of the entire contract shows that it was the intention that the premium should be paid during the life of the assured, nor if the period of extension or days of grace are given only as a favor, and it is apparent that the intent was that the premium might be paid within that time, but would not be accepted if a loss or death had occurred prior thereto, or that the payment would only be accepted on condition that the assured was in good health;[154] and if the policy is forfeited, but conditioned to revive if payment is made within a specified time after the premium falls due, and death occurs before payment, the policy would not be revived by payment.[155] In this connection the words of Mr. Bacon are in point. He says: "In practice, however, it is seldom that the delay granted is considered a period of grace, and where it has been so held some special wording of the policy justified it."[156]

§ **1122. Tender of Premium—Tender to Agent.**—The assured is entitled to a renewal of the policy if he at the proper time and in the proper mode tenders the amount of the pre-

[153] See Kansas Prot. Union v. Whitt, 36 Kan. 760; 14 Pac. Rep. 275; McDonnell v. Carr, Hayes & J. (Irish Rep.) 256; Worden v. Guardian etc. Ins. Co., 7 Jones & S. (N. Y.) 317; Smith v. Continental etc. Ins. Co., 3 Ins. L. J. 63, and cases in last section.

[154] Pritchard v. Merchants & Tradesmen's L. Assur. Soc., 3 Com. B., (N. S.) 622; Mutual B. L. Ins. Co. v. Ruse, 8 Ga. 534; Ruse v. Mutual B. L. Ins. Co., 23 N. Y. 516. And cases in secs. 1118, 1119, ante. "The modern American policies almost without exception require the payment of the premium punctually on the day named in them, and if it is not so paid, the policy is declared to be forfeited. After that time the companies will ordinarily, as a favor, and not a right, renew the policy, if the insured on a new examination is found to be in good health": Bliss on Life Insurance, ed. 1872, sec. 175, p. 253.

[155] Busteed v. West of England Ins. Co., 5 Irish Ch. 553. See Harris v. Equitable etc. Soc., 3 Hun (N. Y.), 724; 6 Thomp. & C. (N. Y.) 108.

[156] Bacon on Benefit Societies and Life Insurance, sec. 370, p. 553. "The English companies . . . . allow a period of grace after the day named in the policy, and do not forfeit the policy if payment is made within the extended time": Bliss on Life Insurance, ed. 1872, p. 253, sec. 175.

mium due,[157] and such tender may be in funds of an insurrectionary government which have supplanted the actual currency of the country, if the premium could have been paid in such funds.[158] So it is held that a tender may be made within the period extended for payment even after death, sickness, or loss.[159] Cases of the character of the last, however, come within the principles of those considered in the four preceding sections. If the premium has not been paid, and the agent has no authority to deliver the policy without prepayment except at his own risk, he looking to the insured for reimbursement, a tender of the premium to the company is unnecessary.[160] Tender may be made to a local agent where the latter has been accustomed to receive them, and such tender will prevent a forfeiture;[161] and tender to an agent of a foreign company residing in the enemy's country may be sufficient.[162] So tender to a former agent in due time may be sufficient where a new agent has been put in his place, and reasonably diligent inquiry fails to find the new agent, and no notice is given assured of the change.[163]

§ **1123. Frequency of Tender.**—It is held that a tender must be made on each occasion of the premium falling due.[164] But it is not required that a party should persist in the doing of a futile act, and if the company refuses to accept a sum tendered in payment of the premium, a formal tender on each succeeding day when the premium matures is unnecessary.[165] So if it clearly appears that the premium would

[157] Mutual L. Ins. Co. v. French, 30 Ohio St. 240.

[158] New York Ins. Co. v. Clopton, 7 Bush (Ky.), 179; 3 Am. Rep. 290. And sec. 1139, herein, on "payment in depreciated funds and confederate money."

[159] McDonnell v. Carr, 1 Hayes & J. (Irish Rep.) 256.

[160] Smith v. Provident Sav. L. Assur. Co., 13 U. S. C. C. A. 284; 24 Ins. L. J. 502; 65 Fed. Rep. 765.

[161] Morey v. New York L. Ins. Co., 2 Woods (C. C.), 663.

[162] Hancock v. New York L. Ins. Co., 2 Ins. L. J. 903.

[163] Seamans v. Northwestern Mut. L. Ins. Co., 3 Fed. Rep. 325.

[164] Life Ins. Co. v. Le Pert, 52 Tex. 504.

[165] Meyer v. Knickerbocker L. Ins. Co., 72 N. Y. 516.

not have been accepted if tendered at the place of contract, no tender need be made before suing on the policy, the company having notified assured after presentation of proofs of loss that there was a forfeiture for nonpayment of the premium.[166] And it is held in Illinois that assured is under no obligation to pay or be in readiness to pay further premiums where the insurer refuses to accept further payments and has declared the policy forfeited.[167] And, as a general rule, if the company has expressly declared a forfeiture of the policy, and it is clearly apparent from acts or declarations that a tender would not be accepted, or if it has declared a forfeiture and refused the premium, the fact that there has been a failure subsequently to pay or tender the premiums as they fell due will not prevent a recovery on the policy.[168] But it is decided that a tender after refusal necessitates tenders thereafter.[169]

§ 1124. Tender After Delivery Up of Policy Fraudulently Induced by Agent.—If the insurer has through its agent's false representations induced the surrender of a policy, and an action is brought to revive the contract, it is no defense that the insured has not tendered or paid premiums due shortly after his delivering up the policy.[170]

§ 1125. Actual Production of Money Unnecessary after Peremptory Refusal to Accept.—If it were otherwise necessary to a proper tender to actually produce and show the money for premiums, nevertheless such acts are rendered un-

[166] Griesemer v. Mutual L. Ins. Co. (Wash. 1895), 38 Pac. Rep. 1031.

[167] Pulling v. Travelers' Ins. Co., 159 Ill. 603; 55 Ill. App. 452.

[168] Sullivan v. Industrial B. Assn., 73 Hun (N. Y.), 319; 26 N. Y. Supp. 186, 190, per Merwin, J.; citing Baumann v. Pinckney, 118 N. Y. 604; 23 N. E. Rep. 916; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 157; 5 N. E. Rep. 417; also so held in Phœnix Ins. Co. v. Doster, 106 U. S. 30; Hamilton v. Mutual L. Ins. Co., 9 Blatchf. (C. C.) 234; Pilcher v. New York L. Ins. Co., 33 La. Ann. 322; 10 Ins. L. J. 312; Girard L. Ins. Co. v. Mutual L. Ins. Co., 86 Pa. St. 236 (one judge dissenting); Attorney General v. Continental L. Ins. Co., 33 Hun (N. Y.), 138; Hayner v. American etc. Ins. Co., 69 N. Y. 435.

[169] Life Ins. Co. v. Le Pert, 52 Tex. 504.

[170] Heinlein v. Imperial L. Ins. Co., 101 Mich. 250; 25 L. R. Annot. 627; 59 N. W. Rep. 615.

necessary by the insurer's peremptory refusal to accept the premium money.[171]

§ **1126. Ratification of Payment may Relate Back to Time of Tender.**—If the first premium is credited by the agent, but thereafter, before loss, a tender of the money is made, and after loss the money is paid to and retained by the company, with full knowledge of the facts, the payment relates back to the time of the tender, and binds the company.[172]

§ **1127. Tender After Payment of Overdue Premiums Unconditionally Requested.**—If an insurance company requests assured to make overdue payments of premium after forfeiture, without conditions being annexed to the request, a tender of such overdue premiums may be made within a reasonable time, and the fact that at the time of the tender the assured was in his last sickness, and within a few days of his death, does not invalidate the tender where the offer to receive the premiums is uncondiitonal as to the health of the assured.[173]

§ **1128. Tender as Prerequisite to Action—Judgment.** If a policy has continued in force by reason of the company's failure to give a necessary notice of the time when the premium becomes due, tender of the premium or its payment is unnecessary prior to bringing an action on the policy.[174] If the plaintiff has inclosed the amount of the premiums in arrears in a letter to the defendant, such letter is competent evidence of the tender necessary as a prerequisite to an action on the policy.[175] And where tender is excused or not required, it is sufficient for the judgment to provide for the payment of

[171] Pulling v. Travelers' Ins. Co., 159 Ill. 603, 609; 55 Ill. App. 452.

[172] Western Home Ins. Co. v. Richardson, 40 Neb. 1; 58 N. W. Rep. 597.

[173] Murray v. Home B. L. Assn., 90 Cal. 402; 25 Am. St. Rep. 133.

[174] Baxter v. Brooklyn L. Ins. Co., 29 N. Y. St. Rep. 592; 23 N. E. Rep. 1048; 7 L. R. Annot. 293; 19 Ins. L. J. 334.

[175] Hartford L. & A. Ins. Co. v. Unsell, 144 U. S. 439; 12 Sup. Ct. Rep. 671; 21 Ins. L. J. 481.

premiums due and unpaid with interest from the time they respectively fall due.[176]

§ 1129. Payment Due Monday when Premium Matures Sunday.—If the day of payment of the premium falls on Sunday, it is payable the following Monday,[177] and a tender made on that Monday is sufficient;[178] for if it is tendered on Sunday there is no obligation to receive it,[179] and the fact that the assured dies Sunday afternoon, even though the premium fell due Sunday noon, will not avail the company;[180] nor is it any defense that the assured died Monday afternoon; for if no hour is specified for payment, all day Monday is given.[181] And this applied to a case where a note given for the premium fell due Sunday, August 7th, and the insured died Monday, August 8th, at one o'clock.[181a]

§ 1130. Holidays—Thanksgiving Day.—It is held in Kentucky that if the payment falls due on Thanksgiving Day, it must be then paid, even though the statute provides that such day is to be deemed, in regard to presentment, etc., of negotiable paper, the same as Sunday; for it does not apply to other business transactions or contracts.[182]

§ 1131. Lien for Premium.—In mutual insurance companies there is generally a provision whereby the insurer has a lien upon the property insured for the premiums, so also for

[176] Myer v. Knickerbocker L. Ins. Co., 72 N. Y. 516.

[177] Leigh v. Knickerbocker L. Ins. Co., 26 La. Ann. 436; Hammond v. American etc. L. Ins. Co., 10 Gray (Mass.), 306; Howland v. Central Ins. Co., 12 Mass. 499; Campbell v. International etc. Assur. Soc., 4 Bosw. (N. Y.) 298; Taylor v. Germania Ins. Co., 2 Dill. (C. C.) 282. See sec. 1259, herein.

[178] Campbell v. International L. Assur. Soc., 4 Bosw. (N. Y.) 298 (tender made about noon on Monday).

[179] Hammond v. American Mut. L. Ins. Co., 10 Gray (Mass.), 306, per the court.

[180] Hammond v. American Mut. L. Ins. Co., 10 Gray (Mass.), 306.

[181] Leigh v. Knickerbocker L. Ins. Co., 26 La. Ann. 436.

[181a] Id.

[182] National Mut. B. Assn. v. Miller, 85 Ky. 88; 2 S. W. Rep. 900, under Gen. Stat. Ky., c. 51, sec. 1.

premium notes;[183] and a statutory or charter provision giving such lien does not prohibit a mutual company from insuring in a foreign country property located there, even though no lien could attach to the property insured, especially where the contract is made at the home office, and is governed by the laws of the state where the office is located, and the charter authorizes the company to insure the property of all who become its members,[184] and such lien is held valid although not filed until after the policy has expired;[185] and the lien may continue where, although the property is destroyed and the loss paid, the member's liabiltity upon this deposit note continues and the contract is not dissolved,[186] nor is such lien defeated by the fact that it covers both personal and real property, although the policy only provides for a lien upon the real property.[187] The company's lien will expire with the death of the insured, and cannot be enforced against his heirs unless they ratify or confirm the policy.[188] So where such right to a lien for the premium existed upon the buildings insured and the land on which they stood, and the insured died in debt for the premium, having devised the property insured, with the land, to his widow, who conveyed it to another who had no notice of the lien, it was held that the lien could not be enforced after the property had passed into the hands of a bona fide purchaser.[189]

§ **1132. Maritime Lien for Premium.**—There is no general or maritime lien for the premium due on a policy of insurance[190] taken on a vessel by her owners for their own ben-

[183] Woodfin v. Asheville Mut. Ins. Co., 6 Jones Law, (N. C.) 558.

[184] Western v. Genesee Mut. Ins. Co., 12 N. Y. (2 Kern) 258. Contra, Genesee Ins. Co. v. Western, 8 U. C. Q. B. 487.

[185] People's F. Ins. Co. v. Hartshorne, 84 Pa. St. 453.

[186] Bangs v. Seidmore, 21 N. Y. 136; 24 Barb. (N. Y.) 29.

[187] People's F. Ins. Co. v. Hartshorne, 84 Pa. St. 453.

[188] Indiana Mut. F. Ins. Co. v. Chamberlain, 8 Blackf. (Ind.) 150.

[189] Kentucky Farmers' Mut. Ins. Co. v. Mathers, 7 Bush (Ky.), 23; 3 Am. Rep. 286.

[190] Re Pennsylvania Ins. Co., 22 Fed. Rep. 109; 24 Fed. Rep. 559. See The Illinois, 2 Flip. (C. C.) 383; De Lovio v. Boit, 2 Gall. (C. C.) 398, per Story, J.

efit;[191] but it is held that the underwriter has a lien to the extent that he is entitled to have the premiums paid out of the proceeds of sale.[192] Maritime liens have priority over state statutory liens for insurance premiums;[193] for admiralty will recognize liens validly created by state statute, and will assign them, as to priority, to the class to which they belong.[194]

SUBDIV. III. Premiums: Manner and Mode of Payment: By and to Whom Payable: Mortgagor and Mortgagee: Miscellaneous Matters.

§ **1137. In What the Premium may be Paid.**—In practice the premium or price for the insurance is paid or promised to be paid in cash, although the parties may stipulate for its payment otherwise, as it is sufficient to constitute a valid contract of insurance that the insurer agrees to assume the risk for a price, premium, or reward to be given by the assured, whether it be money or other certain valid consideration, and the fact that the premium agreed to be paid is other than money does not change the character of the contract so as to make it other than one of insurance, and this is the doctrine of the earlier writers,[195] and is also that of the decisions now in force, so far as the validity of the contract of insurance itself is concerned, independently of other questions which might be involved, such as those of agency or charter, or constitutional limitations in case of mutual companies or benefit societies. But an agent's agreement that the premiums should

[191] The John T. Moore, 3 Wood (C. C.), 61; The Hope, 49 Fed. Rep. 279. See The Dolphin, 1 Flip. (C. C.) 580.

[192] The Dolphin, 1 Flip. (C. C.) 580.

[193] The Woodward, 32 Fed. Rep. 639.

[194] The Menominie, 36 Fed. Rep. 197. But see The Guiding Star, 18 Fed. Rep. 263; 9 Fed. Rep. 521; The Grapeshot, 22 Fed. Rep. 123.

[195] Emerigon (Emerigon on Insurance, Meredith's ed. 1850, c. iii, secs. 7, 10, pp. 70, 75, 76), referring to the earlier authorities and quoting from Pothier, says: "It is not absolutely necessary that this should consist of money." He also says: "If we were obliged to stand on legal subtleties, and to assume that an insurance of which the premium does not consist in a sum of money is not properly a contract of insurance, at any rate one should have to agree that it is a contract equivalent to insurance, and resulting in the same obligations." He further says: "It is enough that a certain or expected benefit is set in the scale against the sea risks thus assumed": Id.

be paid in professional services as the company's medical examiner has been declared invalid.[196] So an agent to accept premiums may not, without express authority from the company, receive personal property in payment;[197] although it is held that if the agent has agreed to receive groceries in payment, the company cannot cancel for nonpayment while the assured is willing and able at all times to pay in such manner;[198] and in an Indiana case the agent received one-fourth of the premium in goods and the balance in notes, although no question was raised as to his authority to accept the goods, it merely being held that the contract treated the premium as paid.[199] But the company may agree that the premium shall be paid by advertisements; the insured in such case is not responsible if the company does not furnish sufficient advertising matter to equal the amount of the premium, and the policy will take effect from its date;[200] and the surrender of an exist-

[196] Anchor L. Ins. Co. v. Pease, 44 How. (N. Y.) 385.

[197] Hoffman v. Hancock Mut. L. Ins. Co., 92 U. S. 161.

[198] Carlwitz v. Germania F. Ins. Co. (U. S. C. C. Dis. N. J. 1883), 12 Ins. L. J. 127.

[199] New England L. Ins. Co. v. Hasbrouck, 32 Md. 447. See further as to payment to agent in other than cash: Raub v. New York Ins. Co., 14 N. Y. St. Rep. 573; Life Ins. Co. v. Davidge, 51 Tex. 244; Critchett v. American Ins. Co., 53 Iowa, 404.

[200] Kentucky Mut Ins. Co. v. Jenks, 5 Ind. 96. The court, per Stuart, J., says in this case: "Much is said in the argument about the payment of the premium and the indorsement of such payment on the policy as essential to the completion of the contract. . . . . Here the contract was complete. It was a contract, too, not according to the course of the company's business. Its very terms dispensed with the ordinary course of payment. . . . . The first year's premium, ordinarily payable in money, was to be paid in printing. The payment was, therefore, a labor to be continued through a series of months. In accepting Jenks' proposition, the board was particular to specify that the first year's premium was to be in advertising. The proposition was accepted, and the policy issued with reference to that mode of payment. By the very nature of the contract, it devolved upon the insurance company to furnish the matter to be advertised. They did so in part, and directed the period during which the publication should be continued. If the matter published did not amount to the first year's premium within forty-five cents, it was not the fault of Jenks. They should have furnished more matter or continued that published longer. The neglect of the insurance company to do either did not affect the rights of the assured. Advertising be-

ing policy is not infrequently made the consideration of the issuance of another.[201]

§ **1138. Cash Premiums—Mutual Company.**—It is held not to be contrary to the principles underlying the mutual insurance systems that the articles of association of a mutual company should provide that a member may, instead of giving a premium note, pay his entire premiums in cash instead of by specific assessments, such cash payment being equivalent to an assessment to the full amount of such note;[202] although in an Illinois case it was held that where a mutual company accepted cash for the premium, the insured did not become a member, and sustained to it no different relations than in case of a stock company.[203]

§ **1139. Payment in Depreciated Funds, Confederate Money.**—A payment made in accordance with the usual course of business known to the principal, in currency issued by a de facto government, and which is accepted by the agent

ing the stipulated mode of payment, the insurance company had no right to demand anything else. Accordingly, if the advertising were done upon the faith of the contract within proper time, and in the only manner in which payment could be made, that is all that could be required. The terms upon which the policy issued, or was to issue, were substantially complied with": Id. 101, 102. The principle of waiver underlying this decision is relied on, and the case cited in, Behler v. German Mut. F. Ins. Co., 68 Ind. 351, and in Willcuts v. Northwestern Mut. L. Ins. Co., 81 Ind. 308. In Pendleton v. Knickerbocker L. Ins. Co., 5 Fed. Rep. 238, commercial paper was taken for the premium, and the court, per Hammond, J., in his charge to the jury, said: "The true measure of the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any other holder would under the commercial law. On the other hand, any neglect to proceed properly in the discharge of that duty would be excused under the same circumstances, as such neglect would be excused with any other holder, and not otherwise": Id. 241, 242.

[201] Such was the case in Kautrener v. Pennsylvania Mut. L. Ins. Co., 5 Mo. App. 581.

[202] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771.

[203] Illinois F. Ins. Co. v. Stanton, 57 Ill. 354.

of a foreign company, is valid. This is illustrated by the following case: The insurer was a neutral, with a general agency in New York and a local agency in Richmond, during the Civil War, and this agent received confederate money in payment of the premium. The court below says: "But from the nature of the power to receive payment the agent necessarily derived the authority to accept whatever was generally used for the purpose of making payments in the locality where the debts were collected. . . . . Gold was shown to have disappeared almost entirely from circulation, and it is a matter of history that the insurrectionary authorities discountenanced the use of United States Treasury notes. . . . . Soon after the agent at Richmond was directed to collect the premiums without renewal receipts, the actual currency of that country was supplanted by confederate notes of the insurrectionary government. Although not made a legal tender for the payment of debts, all other species of currency was soon driven out of circulation by them, and after that they were the financial means used for buying and selling property, and for creating and discharging debts. . . . . These notes were issued soon after the passage of the act providing for them, which was on the 19th of August, 1861, and from that time they passed equal to bank-notes, and during the residue of 1861 and through 1862 they were known as confederate money, and passed almost at par at Richmond. . . . . It was the only feasible mode, under the circumstances, existing at that time in which the premiums could be collected by him, and as it had been made his duty to obtain their payment, he was necessarily authorized to receive it in that manner." And it further appeared that it was the usual course of business for the agent to settle monthly, so that it could not be assumed that the identical money would be forwarded which had been received, and his acceptance of the confederate money under the power given him to collect premiums discharged the assured. The court of appeals also says: "It was a currency issued by the authority of an existing de facto government, which had adopted a constitutional form of government, and was fully organized under it, which had in the field large armies, ...

was recognized as a belligerent power soon after by the British government, and which had from the outset been treated as a belligerent in the United States." [204]

§ **1140. Payment in Foreign Money—Equivalent in United States Money may be Shown.**—It may be shown by a witness what the result is of his calculations as to the equivalent in United States money of premiums payable in English money.[205]

§ **1141. Payment of Premium—Credit may be Given.** It is well settled that credit may be given for the premium, and insurance companies have implied powers so to do. If the agent gives credit and becomes personally liable therefor to the company, the premium is considered as paid.[206] An agent authorized to negotiate risks may, in the absence of a condition making prepayment of the premium a condition precedent, give credit under an executory agreement to assume a risk.[207] And payment to the agent is payment to the company where the latter has been in the habit of treating such agent as its debtor for premiums received by him and to settle with him periodically for the same.[208] If it is understood be-

[204] Robinson v. International Assur. Soc., 52 Barb. (N. Y.) 450; 42 N. Y. 54. See, also, Sands v. New York L. Ins. Co., 50 N. Y. 626; Maritime v. International Assur. Soc., 62 Barb. (N. Y.) 181; 53 N. Y. 339; New York L. Ins. Co. v. Clopton, 7 Bush (Ky.), 179; Polglass v. Oliver, 2 Cromp. & J. 14.

[205] Ward v. Tucker, 7 Wash. 399; 35 Pac. Rep. 1086.

[206] McIntire v. Preston, 5 Gill (Md.) 48; 48 Am. Dec. 321; Insurance Co. v. Colt, 20 Wall. (U. S.) 560; Sheldon v. Connecticut Mut. L. Ins. Co., 25 Conn. 207; 55 Am. Dec. 565; Church v. Lafayette Ins. Co., 66 N. Y. 222; Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Mayo v. Pen, 101 Mass. 555; Teutonia Ins. Co. v. Anderson, 77 Ill. 382; Boehen v. Williamsburgh Ins. Co., 35 N. Y. 131; Homer v. Guardian Mut. L. Ins. Co., 67 N. Y. 478; Missouri L. Ins. Co. v. Dunklee, 16 Kan. 168; Tennant v. Travelers' Ins. Co., 31 Fed. Rep. 322; Baker v. Union Mut. L. Ins. Co., 43 N. Y. 283; Societe etc. v. Morris, 24 La. Ann. 347; Flanders on Insurance, p. 164. See secs. 80-84, herein.

[207] Croft v. Hanover F. Ins. Co. (W. Va. 1895), 21 S. Rep. 854. A general agent has authority to give credit for premiums on delivery of the policy: Pythian L. Assn. v. Preston (Neb. 1896), 66 N. W. Rep. 445.

[208] Pennsylvania Ins. Co. v. Carter (Pa.), 11 Atl. Rep. 102.

tween the parties that there is a binding contract of insurance, and credit is given by the agent for the premium for renewal, a delivery of the policy and actual payment of the premium is not necessary.[209] So credit may be given for the premium by the company's agent under an agreement to temporarily "hold" an expired policy, and such agreement is valid;[210] but local or subordinate lodges cannot give credit for assessments except by virtue of some authorization under the laws of the organization.[211] A custom to allow credit is not proven by the fact that credit has once been given by the company,[212] and where the custom was for the insurer to give credit for about thirty days, and the insured having paid a part of the premium, and the insurer having notified him that the balance must be paid within a limited, specified time, and this is not done, and a loss occurs, the insurer may cancel the policy, it providing therefor, and no recovery may be had thereon.[213] In case of mutual accounts, payment may be made by charging the premium to the insured.[214] Where the policy provided for the payment of a certain annual premium, with an election to pay half or quarterly or thrice yearly in advance with interest, one-third to be indorsed as a loan, and reserving the right to deduct any balance of the year's premium unpaid at the commencement of the year, or any indebtedness to the company, and the insured elected, with the company's consent, to pay in three installments, one of which he paid, but failed to pay the second when due, and died before the third installment for that year was payable, it was held that credit was not given for the last two installments.[215] In case of mutual benefit societies, there would seem to be no valid reason why credit should not be given in the absence of some

[209] Lum v. United States F. Ins. Co. (Mich. 1895), 62 N. W. Rep. 562.

[210] Baker v. Commercial Union Assur. Co., 162 Mass. 358; 38 N. E. Rep. 1124.

[211] See Borgraefe v. Supreme Lodge K. & L. of H., 22 Mo. App. 127.

[212] Willcuts v. Northwestern Mut. L. Ins. Co., 81 Ind. 800.

[213] Bergsen v. Builder's Ins. Co., 38 Cal. 541.

[214] Marsh v. Northwestern Nat. Ins. Co., 3 Biss. (C. C.) 351. See sec. 81, herein.

[215] Howard v. Continental L. Ins. Co., 48 Cal. 229.

prohibition in the constitution, articles of association, or by-laws.[216]

§ **1142. Payment by Order on Third Party.**—That the company may accept an order on a third party for the premium is undoubted; as in case of an order by an employee on his employer.[217] But the paymaster of a railroad has no authority to deduct dues owed by an employee to an employee's relief association.[218]

§ **1143. Effect of Order on Third Party—Demand—Notice of Nonpayment—Forfeiture.**—If the company accepts an order on a third party for the payment of a premium, it operates as an assignment of the designated fund to the insurer for that purpose, and the presumption attaches, in the absence of notification to the insured to the contrary, that payment has been made, and the failure to notify the insured of nonpayment will constitute a waiver of a condition as to forfeiture therefor.[219] It is also incumbent upon the insurer to make demand or to present such order to the drawee for payment, and if it neglects to do so it cannot avail itself of nonpayment arising from such act.[220] Thus, where the policy provided that claims for injuries should be forfeited to the company for any period for which its respective premium should not have been actually paid, the company was held estopped to claim nonpayment where it had accepted an order for the premium, but neglected to present the order before the death of the insured, although several months had intervened during which

[216] See Kline v. National B. Assn., 111 Ind. 462; 60 Am. Rep. 703.

[217] Lyon v. Travelers' Ins. Co., 55 Mich. 141; 54 Am. Rep. 354; Cotten v. Fidelity & Cas. Co., 41 Fed. Rep. 506. In this case the company's agent accepted the order, and forwarded it to the company: McMahon v. Travelers' Ins. Co., 77 Iowa, 229; 42 N. W. Rep. 179; National B. Assn. v. Jackson, 114 Ill. 533; Bane v. Travelers' Ins. Co., 85 Ky. 677; 4 S. W. Rep. 787.

[218] Baltimore & Ohio Employees' Relief Assn. v. Post, 122 Pa. St. 579; 15 Atl. Rep. 885.

[219] Lyon v. Travelers' Ins. Co., 55 Mich. 141; 54 Am. Rep. 354; National B. Assn. v. Jackson, 114 Ill. 533.

[220] Lyon v. Travelers' Ins. Co., 55 Mich. 141; 54 Am. Rep. 354; Cotten v. Fidelity & Cas. Co., 41 Fed. Rep. 506.

it might have been presented.[221] But in another case the drawee did not accept the order, although he paid the two first installments at the times called for in the order; the last two were not paid, however, at the specified time, the insured not then working, but he resumed work, and prior to the accident there was sufficient money in the drawee's hands to pay the balance due. No demand, however, was made upon the drawee; the insured was not notified of the nonpayment, nor was the order returned or offered to be returned, and no notice was given that the contract had ceased. The policy contained a similar condition as to forfeiture as that stated in the last case, and it was held that no recovery could be had.[222] Again, such an order was held not to amount to a payment of the premium where it was drawn upon a railroad company, but was not accepted although retained as a voucher; the order being for the payment of a certain sum out of each month's wages which paid the premium for a specified period under an accident policy. One month's payment only was made. The second month's wages were drawn in full by the insured, who during the second insurance period wrote the insurers to cancel the policy. This, however, was not done, and during this period he was killed. The policy contained a similar condition as in the last two cases. No attempt was even made to collect the second premium, although some wages were due the insured at his death.[223] The company may validly provide in a policy issued upon the consideration of such an order that no liability exists on its part for a loss while the order is unpaid, and if in such case a loss occurs during such nonpayment, no recovery may be had.[224]

§ **1144. Payment by Check.**—A check may be accepted in payment of the premium. Such a manner of payment may be warranted by custom or a course of dealing between the insured and his agent and the party from whom the pre-

[221] Cotten v. Fidelity & Cas. Co., 41 Fed. Rep. 506.
[222] Bane v. Travelers' Ins. Co., 85 Ky. 677; 4 S. W. Rep. 787.
[223] McMahon v. Travelers' Ins. Co., 77 Iowa, 229; 42 N. W. Rep. 179.
[224] Forest City Ins. Co. v. School Directors, 4 Ill. App. 145.

mium is due and payable. Thus, where the company's course of dealing in accepting checks sent by mail in payment of assessments has been such that the insured may fairly and in good faith have been justified in supposing that such a mode of payment would satisfy the company's requirements, and he mails a check for the amount due within the proper time, the company will be estopped from claiming a forfeiture for nonpayment.[225] So payment by check may be warranted by an express direction of the company or its agent, as where it is delivered or mailed or sent by express to the agent or the company under such request;[226] and it has been held that payment by check may be valid even though the same has been dishonored,[227] although it would seem that a check must at least be valid when received.[228] It is held that payment by check is not valid where the policy expressly stipulates for some other mode.[229] But there is no valid reason why both the company and its agent with the requisite authority may not waive a stipulated mode of payment, as well as other conditions.[230] A check does not of itself constitute payment until the check is paid, except there be an agreement to that effect.[231]

§ 1145. Payment with Misappropriated Funds.—It is held in New York that if a member who has insured his life for his wife's benefit pays the premiums until his death wholly out of partnership money misappropriated by him, that the surviving member is entitled to the whole amount of the insurance, such sum being less than the funds misappro-

[225] Kenyon v. Knights Templar & M. Mut. Aid Assn., 122 N. Y. 247; 33 N. Y. St. Rep. 467; 25 N. E. Rep. 1020; 19 Ins. L. J. 1020.

[226] Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 390.

[227] Ætna L. Ins. Co. v. Green, 38 U. C. Q. B. 459.

[228] See Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 390.

[229] See Neill v. Union Mut. L. Ins. Co., 7 Ont. App. 171.

[230] See Hodson v. Guardian L. Ins. Co., 97 Mass. 144; Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 390; Sims v. State Ins. Co., 47 Mo. 54; New York Cent. Ins. Co. v. National Prot. Ins. Co., 20 Barb. (N. Y.) 468.

[231] Greenwich Ins. Co. v. Oregon Imp. Co., 76 Hun (N. Y.) 194; 58 N. Y. St. Rep. 474; 27 N. Y. Supp. 794; affirmed without opinion, 148 N. Y. 758.

priated. But it remained an undecided question before the court as to the result as between the widow and the surviving partner in case the insurance money had exceeded the amount misappropriated.[232]

§ **1146. By Whom Premium Payable.**—The English decisions in marine insurances seem to rest upon a practice which is in effect a system of credits between the broker and the assurer for the premium, which is considered paid as between the latter and the assured.[233] But here the premium is due from the party insured in the absence of some agreement or course of dealing to the contrary, and even though notes may be given by an agent or broker and accepted for the premium, yet where the contract provides for a deduction or setoff from the loss of the unpaid premium, the eventual liability of the insured is practically brought bout in case of a loss where such premium note is unpaid at the time.[234]

§ **1147. Premiums Paid by Debtor in Fraud of Creditors—Husband and Wife.**—If a debtor takes out a policy upon his life payable to his wife and children, and pays the premiums thereon, such policy is not within the protection of the statute permitting insurance by one for the benefit of his wife and children to the exclusion of creditors, for such payments of premiums are in effect gifts to the beneficiary, and void and fraudulent against then existing creditors, and

[232] Holmes v. Gilman, 138 N. Y. 369; 30 Abb. N. C. (N. Y.) 213; 52 N. Y. St. Rep. 873; distinguishing Central Bank v. Hume, 128 U. S. 195; reversing 64 Hun (N. Y.), 227; 46 N. Y. St. Rep. 110. See Holmes v. Davenport, 18 N. Y. Supp. 56. See chapters on beneficiaries herein.

[233] Power v. Butcher, 10 Barn. & C. 329, per Bayley, J., 340, and Parke, B., 347; Beckwith v. Bullen, 8 El. & B. 685; Edgar v. Fowler, 3 East. 222; Great Western Ins. Co. v. Cunliffe, 33 L. J. Com. P. 13; Minett v. Forrester, 4 Taunt. 541. And see sec. 700, ante. See 1 Arnould on Marine Insurance, Perkins' ed. 1850, 109 et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 193-97, for course of practice concerning premiums between broker and underwriter in England.

[234] See Hurlburt v. Pacific Ins. Co., 2 Sum. (C. C.) 271; Columbian Ins. Co. v. Bean, 113 Mass. 541; Dodge v. Union Marine Ins. Co., 17 Mass. 471.

money so paid constitutes equitable assets, which may be reached by a judgment creditor of the insured decedent.[235]

§ 1148. Payment by and Liability of Third Party—Beneficiary—Lien on Policy.[236]—While anyone may pay the premiums, yet if they are paid by a stranger he does not, by reason of the mere fact of the payment itself in the absence of a contract with the party entitled to the benefit, obtain any title to the policy, even though such payment be made in good faith;[237] and a beneficiary who voluntarily, in the absence of

[235] Merchants & Miners' Trans. Co. v. Borland (N. J. Ch. 1895), 40 Cent. L. J. 403; 31 Atl Rep. 272; Act Feb. 19, 1851; Amended Act, March 8, 1871; Rev., p. 640. See chapters herein on beneficiaries.

[236] See sec. 75, herein.

[237] Burridge v. Row, 1 Younge & C. Ch. 183. In this case the vice-chancellor, Lord Justice Knight Bruce, says: "Nothing that has been stated to me has had the effect of persuading me that without any contract for that purpose, the mere fact of making payments of the premiums, however necessary it might be for the preservation of the property, would give the party making these payments a title to the property. I am not aware that there is any authority or principle in support of any such proposition": Id. 191, holding that the coluntary payment of premiums confers no interest on the payer in the policy. In Meir v. Meir, 88 Mo. 566, the court affirms the judgment in 15 Mo. App. 68, on the ground and for the reasons stated therein, and in the latter case the court, per Bakewell, J., says: "In the case of an insurance policy the money belongs to the beneficiary upon the happening of the event provided for, and we know of no policy of the law that the beneficiary takes it from the company with the burthen of repaying to any unknown persons who may have presented it to him, the premiums paid by them without his consent to keep the policy alive. . . . . We know of no particular policy which the law in the interests of society has as to the keeping in existence of insurance policies without the knowledge or consent of the beneficiary. If, contrary to the established doctrine that one can be made the debtor of another by the mere act of the would-be creditor, and against the will or without the co-operation of the debtor, we are, in the case of life insurance contracts, to admit this proposed exception to the general rule. Where are we to draw the line? Is the widow and beneficiary to take the fund subject to any claims of any and all persons who can show that they have lent money to the insured husband to pay his premiums, or paid them, or any of them, at his request? If so, the beneficiary will take her money from the insurance company under circumstances of risk similar to those attaching to the purchase of stock, without knowing what amount may have been paid upon it, and she may become liable for a larger

such a contract, pays the assessments on a certificate in a benefit society, acquires thereby no vested interest to the fund as against a beneficiary thereafter validly designated,[238] although a trustee may be allowed for premiums paid under that particular policy of which he is trustee;[239] and he also has

amount in premiums than she receives from the company. And by what rule are we to confine the right of recovery to a near relative of the deceased, or to limit it to premiums paid, not to exceed the amount of the policy? . . . . The learned counsel for appellant has cited many cases, and seems to have diligently, but unsuccessfully, searched for anything in the books which will sustain his position, that one who has paid the premiums to keep alive a policy without the consent of the beneficiary, and for the beneficiary, might claim a lien upon the fund after it became payable, or recover the premiums from the beneficiary after the money was paid by the company": Id. 75-77. In Aylwin v. Witty, 30 L. J. Ch. N. S., pt. 2, 860, the syllabus reads as follows: "D. & P., under a covenant in the mortgage deed, paid the premiums on a life policy, forming part of the security, as sureties. By a contemporaneous instrument to which they were not parties, the equity of redemption was assigned in trust for the benefit of the creditors of the mortgagor, and D. signed the trust deed as a creditor. The mortgage was paid off, and the policy was sold by the trustees of the creditors' deed under a power contained therein. A creditors' suit being instituted, it was held that the creditors were not entitled to take the money produced by a sale of the policy without making payment in satisfaction of the premiums paid by D. & P." In Leslie v. French, L. R. 23 Ch. D. 552, 561, Fry, L. J., says: "I will first consider the case of payments by a mere stranger. On principle, it is difficult, if not impossible, to see why such payments which, when made without contract or request, are a mere impertinence, should create a lien upon the property. It is evident that in themselves they would not even create a ground of personal action against the person eased by the payment, for it is certain that moneys paid by A for B give no right of action against B. unless they are paid upon his request. . . . . The authorities appear to me to be clear upon this point": Citing Burridge v. Row, 1 Younge & C. Ch. 183; Clack v. Holland, 19 Beav. 262, and considering other analogous cases. See chapter herein as to assignment. An assignee of a life policy, assigned as security against a contingent liability, dependent upon the assured's life, is not liable to assured's estate for failure to apply money given him by a third person to pay premiums, where he has not agreed to pay them: Killoran v. Sweet, 72 Hun (N. Y.), 194; 55 N. Y. St. Rep. 482.

[238] Nix v. Donovan (N. Y. City Ct. 1892), 46 N. Y. St. Rep. 21; 18 N. Y. Supp. 435. See chapters on beneficiaries herein.

[239] Chapin v. Fellows, 36 Conn. 132; In re Earl of Winchelsea etc., 39 Ch. D. 169.

a right to indemnity out of the trust property for money expended by him in its preservation.[240] And in a case where an employee's life was insured and the policy assigned to the employer, conditioned upon his paying the premiums and increasing the employee's salary, it was held that, upon his discharging the employee shortly after such assignment and the decease of the employee, the latter's executors could recover the amount of the policy less the premiums actually paid by the employer.[241] And a wife may obtain an equitable lien upon the amount due under a certificate when she advances the assessments.[242] Again, it has been held that if one, under a supposition that he is the owner of the policy, pays premiums thereon, he may recover back the same.[243] So a mortgagee may be entitled to credit for premiums paid by him where the mortgagor fails to keep his contract to insure the property and the mortgagee himself effects a policy,[244] and a feme covert who pays the premiums on policies assigned to her for a settlement upon her is entitled to a lien on the proceeds,[245] and a third party may become liable for assessments. Where a society of which the insured was a member assumed payment of the premiums because the insured had failed to pay his weekly dues to it, it was held that the company could elect to carry the risk and hold the society liable for the premium, and that the company's liability having become fixed by failure to declare a forfeiture at the time of the death of the insured, it was estopped to claim a forfeiture.[246] Again, a contract to pay premiums may be valid in equity as to a minor beneficiary, and give a right to recover the amount out of the insurance money.[247] It is held

[240] Leslie v. French, L. R. 23 Ch. D. 552, 560, per Fry, L. J.

[241] Scott v. Roose, 3 Irish Eq. 170.

[242] National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111; Weisert v. Muehl, 81 Ky. 336.

[243] Gould v. Emerson, 99 Mass. 154.

[244] Fowley v. Palmer, 5 Gray (Mass.), 549.

[245] Burridge v. Row, 1 Younge & C. Ch. 183; 11 L. J. Ch. 369; affirmed 13 L. J. Ch. 173.

[246] Teutonia L. Ins. Co. v. Anderson, 77 Ill. 382.

[247] Hodge v. Ellis, 76 Ga. 272.

in Illinois[248] that a wife has title to the insurance where she acts in good faith and under an agreement with her husband that if she would pay an assessment due, and thereafter pay them as they became due, the fund should be hers, in pursuance of which agreement he executed a paper making the amount of the certificate payable to her. In this case the fund was by will made payable to the daughters of the husband, as permitted by the by-laws of the association, and the designation of the wife was declared to be an equitable assignment, and also that the interest of the assured in the money had been purchased and paid for by the wife, and therefore he had at his decease no interest remaining which could pass by will.[249] In an English case a policy was effected as collateral security for a loan granted on a bond with sureties, and a bill to restrain an action at law against the sureties was dismissed on the ground that it did not appear that any recovery could be had upon the policies,[250] although a creditor and assignee may by express agreement, though not otherwise, become liable for premiums in a policy held by him as collateral security,[251] and a bondholder may pay premiums to preserve his security and have a lien on the policy for the amount paid.[252] If a payment is made by a third party after death of the insured, this does not prevent the company from defending on the ground that the premium was overdue and the policy forfeited, although its agent accepted said payment and gave an antedated receipt therefor.[253] And such payment by a friend of the insured, made after his decease in ignorance thereof, does not operate as payment and renewal, nor vest any rights in the payee of the policy, al-

[248] Swift v. Railway Conduct. Mut. B. Assn., 96 Ill. 309 (one judge dissenting).

[249] See Garner v. Germania L. Ins. Co., 110 N. Y. 266; 17 Abb. N. C. (N. Y.) 7. See chapter on beneficiaries herein, where this question as to the right to make an agreement vesting the fund is considered.

[250] Edge v. Duke, 18 L. J. Ch. 183. See Barker v. North British Ins. Co., 9 Shaw & D. 869.

[251] Van Duerson v. Scanlan, 7 Cin. L. Bull. 188; 7 Week. L. Bull. 188.

[252] McLean v. Burr, 16 Mo. App. 240.

[253] Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67.

though a receipt is given, it appearing that on learning of the death the receipt was returned and the money paid back.[254]

§ **1149. Same Subject—Rules Stated in Leslie v. French.**[255]—In this case the following rules are stated by Fry, L. J.: "In my opinion, a lien may be created upon the moneys secured by a policy by the payment of premiums in the following cases: 1. By contract with a beneficial owner of the property; 2. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; 3. By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property; 4. By reason of the right vested in mortgagees or other persons having a charge upon the policy to add to their charge any moneys which have been paid by them to preserve the property." [256]

§ **1150. Payment by and Liability for Premium of Agent or Broker.**—The agent of the company may pay the premium himself and hold the assured responsible therefor to him,[257] or he may, in certain cases, assume the payment thereof,[258] and if the company receive the agent's note, signed by himself, the insured is not obligated to the insurer for the premium.[259] So the company may establish a system of charging cash premiums to the broker, he collecting them of the assured and rendering a monthly account to the company, and evidence of such facts is admissible to establish such broker's liability to the company, although not for premiums

[254] Miller v. Central L. Ins. Co., 110 Ill. 102.

[255] L. R. 23 Ch. D. 552, 560.

[256] Citing on the "first" class, Aylwin v. Witty, 30 L. J. Ch., N. S., pt. 2, 860; on the "second" and "third," Clack v. Holland, 19 Beav. 262; Gill v. Downing, L. R. 17 Eq. 316; Todd v. Moorehouse, L. R. 19 Eq. 69.

[257] Home Ins. Co. v. Curtis, 32 Mich. 402; Sheldon v. Connecticut Ins. Co., 25 Conn. 207.

[258] Chickering v. Globe Ins. Co., 116 Mass. 321.

[259] Stackpole v. Arnold, 11 Mass. 27.

not paid, on policies which were never delivered by the broker even though he has not returned them;[260] and this is held to be so even though the company were insolvent at the time the policies delivered were issued by it.[261] But it is also held that if the money received by the agent has not been paid over to the company or accounted for to it, the latter has no right to the premium in its agent's hands where it has in the meantime become insolvent, since the consideration has failed for which the premium was given.[262] If a note is given to the broker or agent, or he has become a creditor of the assured at his request, there is no reason why an action cannot be sustained by the company in the agent or broker's name against the assured on the note.[263] The principal has been held liable on a note given by the agent where the policy did not expressly disclose the agency, even though it impliedly did so.[264]

§ **1151. Premiums Paid Out of Partnership Funds During Solvency.**—Under a New York Supreme Court decision, if a member of a copartnership who has contributed all the capital stock insures his life, and while the firm is solvent, and there is a credit of a large balance to him on the firm's books, pays the premiums out of the partnership funds, then, even though premiums are paid out of the apparent assets of the firm after insolvency, it is held that as between the insured's individual creditors and the firm's creditors the proceeds of the insurance are the insured's individual assets.[265]

§ **1152. Payment of Premium by Mortgagee.**—A mortgagee may render himself liable for the payment of premiums

[260] Monitor Mut. F. Ins. Co. v. Young, 111 Mass. 537.

[261] Monitor Mut. F. Ins. Co. v. Young, 111 Mass. 537.

[262] Smith v. Binder, 75 Ill. 492.

[263] Taylor v. Lowell, 3 Mass. 352, per Sewall, J.

[264] Insurance Co. of Pennsylvania v. Smith, 3 Whart. (Pa.) 520. But see Patapsco Ins. Co. v. Smith, 6 Har. & J. (Md.) 166. Emerigon says an agent who causes himself to be insured for account of others is personally bound for the premium, because he only is known in the affair, and confidence is reposed in him alone: Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 6, p. 69.

[265] Bartlett v. Goodrich, 91 Hun (N. Y.), 642; 33 N. Y. Supp. 444.

on a policy taken out by the mortgagor. Thus, where the policy is payable to the mortgagee, and a mortgage slip attached thereto provides that the mortgagee shall be liable on demand for the premium in case the mortgagor does not pay it, and, in case of an increase of risk, shall pay the additional premium if not paid by the mortgagor, the payment of such premium by the mortgagee is not optional, but he is liable therefor in case of nonpayment by the mortgagor.[266] So where the policy was payable to the mortgagee, and the company's by-laws provided that alienation by the mortgagor should not affect the former's right to recover, and that the mortgagee should pay all assessments in case of nonpayment thereof by the mortgagor on demand, and the mortgagor failed to pay the same when required, the company was held liable to the mortgagee, even though another by-law provided that nonpayment of assessments after notice should avoid the policy.[267] A mortgagee may also obligate himself to pay the premiums and keep the property insured during the loan period, and for failure so to do may render himself liable as an insurer.[268] But where the mortgagor covenants to pay the premiums, with authority given the holder of a mortgage as collateral to pay in case the former does not, such mortgage holder can only recover nominal damages for failure to pay the premiums as stipulated.[269] But where a broker effected a policy for a shipowner, and thereafter the mortgagees were named in the policy, they were held not liable for the premium.[270]

§ 1153. Payment of Premium by Mortgagor—Right to Proceeds.—If it is covenanted in the mortgage that the premises shall be kept insured by the mortgagor, and, in case

[266] St. Paul F. & M. Ins. Co. v. Upton, 2 N. Dak. 229; 50 N. W. Rep. 702; 21 Ins. L. J. 190.

[267] Francis v. Butler etc. Ins. Co., 7 R. I. 159.

[268] Soule v. Union Bank, 30 How. Pr. (N. Y.) 105; 45 Barb. (N. Y.) 111.

[269] National Assur. Ins. Co. v. Best, 2 Hurl. & N. 605.

[270] Roxburgh v. Thomson, 22 Sess. Cas. (2d Ser. Cases in Scot. Ct. Sess. 1859-60) 1187.

of his failure to do so, the mortgagee shall be entitled so to do, and he does insure, the mortgagor having failed to insure, he may, in settlement of the account, charge any moneys paid for insurance against the mortgagor.[271] If the mortgage covenants that the mortgagor shall insure, and that if he does not the mortgagee may do so, and the premiums paid shall be deemed secured by the mortgage, and a policy is issued to the mortgagee upon his interest, under an agreement that the insured shall assign to the insurer an interest in the mortgage equal to the amount of loss paid, the insurer may pay the amount of the loss, together with the premiums to the assured, and is entitled to the subrogation stipulated, and in an action to foreclose the mortgage neither the mortgagor nor his grantee can claim an application of the amount of insurance as payment upon the mortgage.[272] But if the mortgagee insure at the expense of the mortgagor, he must account to him for the proceeds on the mortgage debt.[273] If the mortgagor is neither responsible for the premiums nor pays them, but they are paid by the mortgagee on an insurance effected on his own account, the mortgagor can claim no benefit under the policy.[274]

§ 1154. When Mortgagor may be Charged for Premiums Paid by Mortgagee.—In determining the right of the mortgagee to insure and charge the premiums to the fund or mortgagor, consideration must be given to the fact whether under the covenants of the mortgage or some contract the mortgagor has obligated himself to insure, and has broken the agreement. Sometimes the contract provides that the

[271] Overby v. Fayetteville B. & L. Assn., 81 N. C. 56.

[272] So held in Foster v. Van Reed, 70 N. Y. 19; reversing 5 Hun (N. Y.), 321. See Norwich F. Ins. Co. v. Boomer, 52 Ill. 443; Concord Union Mut. F. Ins. Co. v. Woodbury, 45 Me. 447; Cone v. Insurance Co., 60 N. Y. 619, 624; Kernochan v. Insurance Co., 17 N. Y. 428, 441. And examine Pendleton v. Elliott, 67 Mich. 496; 35 N. W. Rep. 97.

[273] Pendleton v. Elliott, 67 Mich. 496; 35 N. W. Rep. 97.

[274] Pendleton v. Elliott, 67 Mich. 496; 35 N. W. Rep. 97. See White v. Brown, 2 Cush. (Mass.) 412; Concord U. M. F. Ins. Co. v. Woodbury, 45 Me. 447; Stinchfield v. Milliken, 71 Me. 567.

premiums paid in such case shall be a lien upon the premises, or the mortgagee may have insured at the mortgagor's request, or it may be conditioned to be at his expense or that the premium shall be repaid. The fact whether the insurance is effected by the mortgagee upon his own interest is a determining factor. In brief, the covenants of the mortgage or contracts of the parties thereto, or the express or implied authorization of the mortgagor and the insurance carried by the insured are all material factors in the question, and a statutory provision may determine the point; as in Connecticut, where it is provided that premiums so paid by the mortgagee are made part of the mortgage debt,[275] although it would not necessarily be conclusive. The rule may, however, be stated as follows: The mortgagee may charge the fund or the mortgagor with the premiums paid by him where the mortgagor has covenanted or contracted to insure and fails to perform, and the mortgagee himself insures;[276] where the covenant in the mortgage is that the mortgagor shall insure, and if he does not, then that the mortgagee may insure, and the premiums paid shall be a lien upon the premises;[277] or in case the mortgagee effect the policy at the mortgagor's request;[278] or where there is a covenant in the mortgage authorizing the mortgagee to insure at the expense of the mortgagor, and a condition for the repayment of premiums advanced, and the premiums so paid are chargeable against the fund, there being subsequent mortgages on the property which was sold under a decree and obtained by the first mortgagee, the proceeds beyond the debt due him being paid into court.[279] But the insurance must

[275] Gen. Stat. 1887, p. 358; Rev. Stat. 1888.

[276] See Hodgson v. Hodgson, 2 Keen, 704; Johnson v. Horsford, 110 Ind. 572; Overby v. Fayetteville B. & L. Assn., 81 N. C. 56; Bliss on Life Insurance, ed. 1872, sec. 421.

[277] Foster v. Van Reed, 5 Hun (N. Y.), 321. Although reversed in 70 N. Y. 19, it is not disputed that the rule as applied to the facts stated in the text would have governed, had not the mortgagee insured his own interest as such.

[278] Mix v. Hotchkiss, 14 Conn. 31.

[279] Burgess v. Southbridge Sav. Bank, 2 Fed. Rep. 500. See, also, on this point Fowley v. Palmer, 5 Gray (Mass.), 549; Carr v. Hodge, 130 Mass. 55.

actually have been obtained to entitle the mortgagee to charge the mortgagor or the fund.[280]

§ 1155. When Premiums not Chargeable to Mortgagor. When a mortgagee insures his own interest, he is not, as a matter of course, entitled to charge the premium to the estate,[281] and unless there is some covenant in the mortgage, or some agreement by which the mortgagor is obligated to pay the premium, or under which it may be chargeable to the fund or to him, or unless there is some express or implied authorization from the mortgagor to insure, the mortgagee cannot charge the premiums on policies effected by himself, since he cannot thereby add to the mortgage debt, and it is even held that there must be some express contract either to effect a policy or requiring the mortgagor to insure.[282]

§ 1156. Payment of Premium as Connected with Subrogation—Mortgagor—Mortgagee.—In the absence of an express stipulation in the policy as to the insurer's right of sub-

[280] Bliss on Life Insurance, ed. 1872, sec. 421; citing Grey v. Ellison, 1 Giff. 438; 25 L. J. Ch. 666.

[281] Pierce v. Faunce, 53 Me. 351. See Fowley v. Palmer, 5 Gray (Mass.), 549.

[282] Dodson v. Loud, 8 Hare, 216; 4 De Gex & S. 575. The syllabus in this case (8 Hare) reads: "A mortgagee of houses who is not by express contract with the mortgagor entitled to insure the premises against fire at the mortgagor's expense, nor to require the mortgagor so to insure them, is not entitled to add to his mortgage debt, and charge upon the property the premiums which he may pay for such insurance effected by him without the privity of the mortgagor": See Nordyke v. Gery, 112 Ind. 535; 13 N. E. Rep. 683, where it is said, per Mitchell, J.: "That the right of a mortgagee to avail himself of the benefit of insurance taken out by the mortgagor depends wholly upon contract, and that his right to invoke the aid of a court of equity to enforce a lien upon money arising from unassigned policies, effected by and in the name of the mortgagor, depends entirely upon the existence of an unperformed executory agreement on the part of the mortgagor": Id. 540. In Faure v. Winans, Hopk. Ch. (N. Y.) 283 (2d ed. 322), it is held that "the expense of insurance against fire is not a charge upon mortgaged premises, unless by express agreement of the mortgagor or the owner of the estate."

rogation,[283] if the mortgagee effects an insurance in his own name and pays the premium, it is held that the insurer is entitled to become subrogated to his rights as against the mortgagor.[284] But if the mortgagor insures for the benefit of the mortgagee, and pays the premium, or if the mortgagee effects a policy, and the mortgagor, by the payment of the premiums, obtains an interest in the insurance, it is held that the insurer cannot take, as against the mortgagor, any rights by subrogation.[285]

§ 1157. Payment of Premium by Assignee of Mortgage. An assignee of the mortgagee may pay the premium and claim the same rights as to premiums paid by him as the mortgagee himself could have done.[286] Where the mortgagor assigned his insurance on the property to the mortgagee, who assigned both the policy and mortgage to another, who in time sold the premises, the purchaser agreeing to satisfy the mortgage, but the policy was not assigned to him, it was held that the return premium paid to the assignee of the mortgagee was for the use of the mortgagor.[287]

§ 1158. Forfeiture for Nonpayment of Premium by Mortgagor—Defense by Mortgagee.—If the mortgagor ef-

[283] Dick v. Franklin Ins. Co., 10 Mo. App. 376 (so stipulated); Traders' Ins. Co. v. Race, 142 Ill. 328; 31 N. E. Rep. 392; affirming s. c., 29 N. E. Rep. 846 (stipulation for subrogation if company paid mortgagee, claiming that no liability existed as to mortgagor). See Eddy v. London Assur. Corp., 143 N. Y. 311, 320, 656; 38 N. E. Rep. 307 (agreement to subrogate existed).

[284] See Norwich Union Ins. Co. v. Bonner, 52 Ill. 442; Honore v. Lamar F. Ins. Co., 51 Ill. 409; Carpenter v. Providence-Washington F. Ins. Co. v. Kelley, 32 Md. 421; Suffolk etc. Ins. Co. v. Boyden, 9 Allen (Mass.), 123; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385. Contra, King v. State Mut. F. Ins. Co., 7 Cush. (Mass.) 1; International Trans. Co. v. Boardman, 149 Mass. 158. Examine chapter on subrogation herein.

[285] Kernochan v. New York Bowery F. Ins. Co., 17 N. Y. 441; 5 Duer (N. Y.), 1. See Traders' Ins. Co. v. Race, 142 Ill. 328; 29 N. E. Rep. 846; 21 Ins. L. J. 363; Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389. See sec. 765, herein; but examine chapter herein on subrogation.

[286] Montague v. Boston etc. R. R. Co., 124 Mass. 242.

[287] Felton v. Brooks, 4 Cush. (Mass.) 203.

fects a policy payable to the mortgagee, and sends it to the latter and no premium has been paid thereon, the insurer may defend on such ground where the policy provides that it shall not take effect until payment of the premium and it is sent to the mortgagor with a request for such payment, and the fact that the mortgagee has no notice or knowledge of such nonpayment will not avail him.[288]

§ 1159. Amount of Premium for which Mortgagor is Chargeable may be Limited.—The amount of premium for which the mortgagor is chargeable may undoubtedly be limited by the express covenants of the mortgage or by contract, or there may be an implied limitation of such premiums; as in case there is a stipulation as to the amount of insurance, then the mortgagee will be entitled only to charge the mortgagor for premiums paid on such amount.[289]

§ 1160. Policy Taken as Collateral—Right of Mortgagee to Charge Premiums—Right to Deposit Premium. If a life policy of the mortgagor is taken as collateral and the premiums paid, they cannot be charged as an additional burden on the property mortgaged, it not appearing that the mortgage contract provided for such payment of premiums.[290] If a perpetual policy of insurance is assigned to a mortgagee as collateral security for the mortgage debt, he is entitled to the deposit premium where upon a sale of the mortgaged premises upon a foreclosure there is not enough realized to satisfy said debt.[291]

§ 1161. Right of Mortgagee to Recover Premiums Paid after Decree.—If the mortgagee after decree and during the time allowed for redemption before sale pays the premiums which he might otherwise be justly entitled to receive from

[288] Union Bldg. Assn. v. Rockford Ins. Co., 49 Iowa, 1032; 49 N. W. Rep. 1032.

[289] Conover v. Grover, 31 N. J. Eq. 539.

[290] Lambertville Nat. Bank v. McCready B. & P. Co. (N. J. Ch. 1888), 15 Atl. Rep. 388.

[291] Rafsynder's Appeal, 88 Pa. St. 436.

the mortgagor, and the decree does not provide for reimbursement, he cannot recover back the same from the mortgagor.[292]

§ 1162. Purchaser of Mortgaged Premises—Previously Advanced Premiums.—One who purchases mortgaged premises is not, in the absence of an express agreement, liable for previously advanced insurance premiums of the mortgagee, although such purchaser assumes the mortgage debt.[293]

§ 1163. Payment of Premium—Sending by Mail.—There is no doubt but that the premium may be paid through the mail if it is so agreed, or if a course of dealing between the parties warrants such a mode. As a rule of general application it is a presumption of fact that a letter properly addressed and mailed, postage prepaid, is duly received in the regular course of mail.[294] If the premium is authorized to be paid through the mail, it is paid by depositing a prepaid letter, properly addressed, in the postoffice, containing the remittance, and the party has done all that can be required in order that it should reach the other party in due course of time. Thus the rule was applied where a notice was sent the insured by mail, requesting that "all checks and postoffice orders" be made payable to the company, and also requesting that "this notice" be inclosed "with your remittance, and it will be stamped 'paid' and returned to you," although the notice stated that all premiums were due and payable at the company's office, and on the same page below the notice there was printed matter headed "important," stating that the premium was "payable at Hartford, Conn.," the company's place of business, but this note also stated, "We enclose you an envelope directed to the company, which please use in sending your remittance." [295] But if the policy or by-laws pro-

[292] Northwestern Mut. L. Ins. Co. v. Druen, 15 Wis. 419.

[293] So held in Garza v. Western Mut. etc. Inv. Co. (Texas C. C. A. 1894), 27 S. W. Rep. 1090.

[294] 1 Greenleaf on Evidence, 14th ed., sec. 40, n. a; citing Briggs v. Hervey, 130 Mass. 187; Huntley v. Whittier, 105 Mass. 391; Bank v. McManigle, 69 Pa. St. 156, and other cases.

[295] Primeau v. National L. Assn., 77 Hun (N. Y.), 418; 60 N. Y. St. Rep. 41; 28 N. Y. Supp. 794. See 144 N. Y. 716. See Shed v. Britt, 1 Pick. (Mass.) 401; and see, also, sec. 1144, herein.

vide that payment must be made at a specified place, as at the home office or to a designated agent, the question whether a deposit of a properly addressed and postage prepaid letter in the postoffice on the day the premium becomes due constitutes payment must be determined by the fact whether there has been an agreement, express or implied, that such acts shall constitute payment, or whether there has been a waiver of such condition in the policy or by-laws, or whether there has been such a custom or course of dealing between the parties as to induce the reasonable and justifiable belief on the part of the assured that payment in such a manner and at such a time is sufficient. And it is held that depositing a letter properly addressed in the postoffice, postage prepaid, operates as a payment at that time where payment of premiums by mail is authorized by the insurer.[296] But if the insured, contrary to instructions to deliver the premium to an express company, mails a letter inclosing the money, this does not constitute payment.[297]

§ **1164. Check Mailed on Last Day for Payment.**—If it has been the custom for a member to pay by check mailed on the last day of payment, such payment is good though the member has before such mailing received a notice, to which a fine print coupon is attached, providing that remittances must be received at the home office before the time specified for payment expires.[298]

§ **1165. Payment of Premium—Delivery to Express Company.**—If a premium is delivered to an express company in accordance with the insurer's instructions, and properly addressed, such delivery constitutes payment,[299] even though

[296] Primeau v. National L. Assn., 77 Hun (N. Y.), 418; 60 N. Y. St. Rep. 41; affirmed 70 N. Y. St. Rep. 868; McCluskey v. National L. Assn., 77 Hun (N. Y.), 556; 60 N. Y. St. Rep. 280.

[297] Donald v. Life Ins. Co., 4 S. C. 321.

[298] Van Bokkelen v. Massachusetts B. L. Assn., 90 Hun (N. Y.), 330.

[299] Whittey v. Piedmont etc. L. Ins. Co., 71 N. C. 480.

the money be embezzled by the express carrier.[300] An insurance company's agent wrote to the insured when he sent the notice when it would be due that he might forward the premium by bank check, private check, "or you can send by express." There were three express carriers between the residence of the insured and the place of business of the company. The insured sent the money by one of these expressmen, who embezzled it, and it was held that this was a sufficient payment of the premium.[301]

§ 1166. Payment of Premium by Dividends or Profits.[302] The policy in a mutual company may stipulate as to the appropriation of dividends, and such stipulation controls.[303] In case, however, the by-law of such company provide that members giving premium notes shall be entitled to dividends, while those paying cash premiums shall not, such by-law is harmless in effect, as it only increases the assessments on such notes, although it is probably invalid as inconsistent with such methods of insurance.[304] Unearned premiums cannot be said to be profits,[305] and dividends declared from profits on premiums on unexpired risks are subject to reclamation by the corporation;[306] and though profits are credited on the policies, they are absolute funds of the company while the risk continues.[307] Profits earned, but not declared as dividends or otherwise, cannot be treated as funds in the hands of the company, applicable to the payment of premiums.[308] If there is a special contract that the premiums upon certain policies in a mutual insurance company shall be paid in gold, and the losses be paid in the same currency, the company on declaring

[300] Currier v. Continental L. Ins. Co., 53 N. H. 539.

[301] Currier v. Continental L. Ins. Co., 53 N. H. 539.

[302] See sec. 1235, herein.

[303] Hull v. Northwestern Ins. Co., 39 Wis. 397.

[304] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771.

[305] Hope etc. Ins. Co. v. Perkins, 4 Rob. (N. Y.) 182.

[306] Lexington etc. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412; 66 Am. Dec. 165.

[307] Com. v. Union Ins. Co., 112 Mass. 192.

[308] Mutual L. Ins. Co. v. Girard L. Ins. Co., 100 Pa. St. 172.

its dividends should allow the holders of such policies a certificate for their share of the profits in accordance with a gold standard as compared with currency, and equity has jurisdiction to compel them to do so.[309] Premiums may be paid in whole or part by dividends when declared, or where they stand to the credit of a member of a mutual company,[310] especially where the dividends are more than sufficient to pay the accruing premium when it falls due,[311] and a charging of the premiums by the company to the account of the dividends constitutes payment where mutual accounts are kept.[312] In case a participating policy provides for an "equitable share of the divisible surplus," it will not be considered that the entire profits were intended to be divided among the policyholders, but such a share only as the managers of the company may, in the exercise of their discretion and good faith, declare as profits, they having in view a reasonable and necessary provision for the safety of the company.[313] Dividends and other benefits accrued or to accrue will pass by a valid assignment or transfer of the policy.[314] If there has been a custom to apply dividends in payment of premiums, they should be so applied.[315] So also where it is necessary to save a for-

[309] Luling v. Atlantic etc. Ins. Co., 45 Barb. (N. Y.) 510.

[310] Girard L. Ins. etc. Co. v. New York Mut. L. etc. Co., 97 Pa. St. 15; 10 Ins. L. J. 257; Chicago L. Ins. Co. v. Warner, 80 Ill. 410.

[311] Girard L. Ins. etc. Co. v. New York Mut. L. etc. Co., 97 Pa. St. 15.

[312] Butler v. American Pop. L. Ins. Co., 10 Jones & S. (N. Y.) 342. See cases in preceding note.

[313] Bain v. Ætna L. Ins. Co. (Can. H. C. of J. Q. B. D. 1891), 11 Can. L. T. 273.

[314] Johnson v. Johnson, 15 Jur. 714; Roberts v. Edwards, 9 Jur., N. S., 1219.

[315] Girard L. Ins. Co. v. Mutual L. Ins. Co., 97 Pa. St. 15; 10 Ins. L. J. 257, 272. The court, per Paxson, J., says: "The last question to be noticed relates to the exclusion of the evidence offered by the plaintiff to show a custom or usage among life insurance companies in Philadelphia to receive overdue premiums. That such a custom may be shown was ruled in Helme v. Philadelphia L. Ins. Co., 61 Pa. St. 107. . . . . We are unable to see any sufficient reason why the question referred to in the fifteenth assignment should have been excluded. It was as follows: 'Does the custom apply to policies containing a clause of forfeiture for non-

feiture; the dividends in such case must, however, equal the amount due for the premium,[316] and no forfeiture can be declared by the company without notice of the amount due where the assured is entitled to know the amount due over and above dividends in which he shares.[317] Thus, where A insured his life on the half-note plan, by which he was entitled to have certain dividends applied in reduction of the pre-

payment of premium on the day it is due?' Of course the custom sought to be proved must be applicable to contracts, such as the one in suit. But applicable in what respect? Manifestly, in the matter of forfeiture, which was the only point the custom had reference to. The question was carefully framed to meet this view, and it was error to exclude the evidence." And see note to this case, 10 Ins. L. J. 273-75. In Manhattan L. Ins. Co. v. Hoelzle (U. S. S. C. 1877), 8 Ins. L. J. 226, the following charge was sustained: "If the custom of the company was to apply dividend scrip, if the policy holder so requested, to the payment of the next premium, and in this case such application was made and refused, then the failure to pay the premium in dispute is no defense to the right of recovery." Other charges were made, and the court was divided upon the case. No opinion was given, however. In Franklin L. Ins. Co. v. Wallace, 93 Ind. 7, the note stipulated that dividends on the policy be applied to the payment of the note, and the court, per Elliott, J., held that it was the duty of the company to have so applied, and that if the company had dividends on the policy in its hands sufficient to pay the note, and if it had long been its custom so to do, it must make the application. The court cites Girard v. Mutual L. Ins. Co., 97 Pa. St. 15, and says: "The decision rests on solid principle, for policy holders in a mutual insurance company are members of the corporation, and are entitled to have its officers and agents give just and reasonable protection to their rights": Id. 11. In Chicago L. Ins. Co. v. Warner, 80 Ill. 410, it is held that a custom or course of dealing may be relied on to prevent a forfeiture, and that a dividend in the absence of an express agreement to the contrary will be treated as a payment of the premium.

[316] Bulger v. Washington L. Ins. Co., 63 Ga. 328, in which Chief Justice Warner said: "Upon the defendant company's demurrer to a bill filed by complainant against it, we find no error in the sustaining of the demurrer. It is not affirmatively shown by the complainant that the dividends due by the defendant would have been sufficient to keep the policy alive to the date of the insured's death": See Wheeler v. Conn. Mut. L. Ins. Co., 82 N. Y. 543; note to Girard L. etc. Co. v. New York Mut. L. etc. Co., 97 Pa. St. 15, and cases in last note.

[317] Home L. Ins. Co. v. Pierce, 75 Ill. 726.

miums, which latter he paid yearly on receipt of a note from the company stating the balance due, though not till several days after the day fixed, it was held that it was the duty of the company to send him such notice, and that they were estopped from pleading a forfeiture on the ground of non-payment ad diem.[318]

§ **1167. To Whom Premiums may be Paid.**—The premium may be paid to the company or to its authorized agent, and if the agent is clothed with apparent authority to receive the premium, it is sufficient,[319] although a distinction is made between the authority of an agent to receive the first and subsequent premiums.[320] If one is intrusted by the company to deliver the policy, the premium may be paid to him, and it is payment to the company.[321] So payment to a local agent is sufficient where the company has received them without objections,[322] or where such agent is authorized to close the contract;[323] but the mere fact that the broker employed to effect the insurance is willing to give credit does not make the contract binding.[324] So payment may be made to a broker authorized to deliver the policy although the policy provides otherwise.[325] So it may be made to the broker who negotiated the policy, he having accepted and retained the same,[326] and where the agent directs such broker to hold the premium for a time and credit the company with the amount, charges the same to the broker, and transmits it to the company, it is a question for the jury whether payment has been made.[327] If,

[318] Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 30.

[319] Gosch v. State Mut. F. Ins. Co., 44 Ill. App. 263; 24 Chi. Leg. News, 276.

[320] Bouton v. American Mut. L. Ins. Co., 25 Conn. 542.

[321] Gosch v. State Mut. F. Ins. Co., 44 Ill. App. 263.

[322] Morey v. New York L. Ins. Co., 2 Woods (C. C.), 663.

[323] Critchett v. American Ins. Co., 53 Iowa, 404; 36 Am. Rep. 230.

[324] Marland v. Royal Ins. Co., 71 Pa. St. 393.

[325] Greenwich Ins. Co. v. Union Dredging Co., 14 Daly (N. Y.), 237; Gosch v. State Mut. F. Ins. Co., 44 Ill. App. 263; 24 Chi. Leg. News, 276.

[326] Wilber v. Williamsburgh City F. Ins. Co., 1 N. Y. St. Rep. 312.

[327] Pittsburgh Boatyard Co. v. Western Assur. Co., 118 Pa. St. 415; 11 Atl. Rep. 801.

however, the agent is known to have no power to bind the company, payment to him does not bind the company.[328] These questions have, however, been fully considered in preceding chapters in this work.[329] Premiums due from a railroad employee to whom an accident policy is issued may be paid by leaving the dues in the hands of the paymaster of the railroad where the policy so provides and it is so agreed, and in such case it is not obligatory upon the assured to see that the paymaster turns the money over to the company.[330]

§ **1168. Place of Payment.**—The place of payment of the premium is not necessarily dependent upon the contract itself, because that is in this respect subject to modification by many circumstances, especially in cases amounting to waiver and estoppel. Where the policy provided for payment on or before certain specified days at the office of the company in the city of New York, or to agents upon production of receipts signed by the president or secretary, otherwise the contract should be void, it was held that payment must be made at the times stipulated either to an agent, if one appeared and presented the receipt, otherwise at the company's office,[331] and a foreign company is not obliged to keep an agent in another state where the insured resides to receive premiums although the contract was there made.[332] So although the contract may be subject to the law of the place where made, the premium may nevertheless by the terms of the policy be payable at the home office.[333] The place of payment may also be determined by agreement between the assured and an authorized agent where the policy fails to specify the place,[334] and if the policy provides for payment at the home office, it is held that the death of the local agent at the place where the assured

[328] More v. New York Bowery F. Ins. Co., 130 N. Y. 537; 42 N. Y. St. Rep. 543; 29 N. E. Rep. 757.

[329] See chapters on agency, herein.

[330] Fidelity & Cas. Co. v. Johnson, 72 Miss. 333; 17 S. Rep. 2.

[331] Williams v. Washington etc. Ins. Co., 31 Iowa, 541.

[332] Quinn v. Manhattan L. Ins. Co., 28 La. Ann. 135.

[333] Thriving v. Great Western Ins. Co., 111 Mass. 93.

[334] Blackberry v. Continental Ins. Co., 83 Ky. 574.

resides does not excuse compliance with the terms of the policy.[335] In another case where the insurer was a foreign company, no place of payment was prescribed, but the agent who delivered the policy said he would call regularly and receive the premiums when due, that he might sometimes be away, but to wait until he called. He had called twice and collected premiums then due. The premium in question was ready, but was not paid because the agency had been revoked, and it was held that whether the plaintiff was guilty of laches was for the jury to decide.[336]

§ **1169. Liability for Premiums after Forfeiture.**—If the policy has been forfeited by reason of taking out other insurance, no liability arises against the insured for premiums accruing after such forfeiture.[337] But the company has the right to recover a premium for which credit has been given even though the policy is forfeited or canceled.[338]

§ **1170. Revival of Policy.**—If a policy is forfeited by nonpayment of the premium as stipulated thereon, the company may revive the same by a new agreement, or it may by its acts or declarations, or those of its authorized agent, waive the forfeitures or be estopped to claim the same;[339] or a statutory obligation may rest upon the company to revive the policy upon payment of the full amount of the premium at any time before cancellation, in which case the company may, at its option, let the policy remain uncanceled and accept the premiums when paid.[340] In case of a reinstatement upon condition that the assured is in good health, the policy and the representations upon which it is based and the renewal are to

[335] Bulger v. Washington L. Ins. Co., 63 Ga. 328.

[336] O'Reilly v. Guardian L. Ins. Co., 60 N. Y. 169; 3 N. Y. S. C. 487; 1 Hun (N. Y.), 460.

[337] Mutual Assur. Soc. v. Holt, 29 Gratt. (Va.) 612.

[338] Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354.

[339] Robertson v. Metropolitan L. Ins. Co., 88 N. Y. 541; Diehl v. Adams Co. etc. Ins. Co., 58 Pa. St. 443. See c. xxxiv, herein, on "premiums, excuses, waiver, and estoppel."

[340] Morrow v. Des Moines Ins. Co., 84 Iowa, 256; 51 N. W. Rep. 3.

be considered together.[341] If a policy is suspended for nonpayment of an installment on the premium note, it is held that a judgment for the premium will revive the policy, for payment of the note, whether voluntary or enforced, will have that effect.[342] But the policy is not revived by the receipt without knowledge of the maker's insolvency, of interest on the premium note.[343] If revival is upon the evidence that the assured is in good health, and the certificate of health upon which the revival is based was given when the assured was in her last sickness, and stated that she was equally as well and in as good insurable condition as when examined for insurance, and had not been sick since that time, and the assured died a few days thereafter, it was held that the failure after said death to return premiums which were accepted in good faith at the time of the reinstatement and without actual knowledge of the facts was not a ratification of the contract of renewal, and that the company might defend on the ground of the inability of the policy.[344]

§ 1171. Recovery of Premiums by Unauthorized Company.—It is held in Washington that the fact that insurers are not authorized to do business in that state does not prevent the recovery of premiums where a broker obtains for a person in that state insurance in a foreign state.[345]

[341] Day v. Mutual B. L. Ins. Co., 1 MacArth. (D. C.) 41.

[342] American Ins. Co. v. Klink, 65 Wis. 78.

[343] Reynolds v. Mutual F. Ins. Co., 34 Md. 280.

[344] Harris v. Equitable etc. Soc., 6 Thomp. & C. (N. Y.) 108; 3 Hun (N. Y.), 724.

[345] Ward v. Tucker, 7 Wash. 399; 35 Pac. Rep. 1086. See c. xxxi, herein, on premium notes.

CHAPTER XXX.

THE PREMIUM—PAID-UP AND NON-FORFEITABLE POLICIES.

§1178. Paid-up and nonforfeitable policies—Generally.
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§ 1178. Paid-up and Nonforfeitable Policies—Generally.—Many questions of construction have arisen under what are known as nonforfeitable policies. Many policies provide that after the payment of a specified number of annual premiums the holder shall be entitled to a paid-up policy; or a life policy may be conditioned for specified annual payments during a term of years when it will be considered paid-up. The contract may provide the terms upon which such paid-up policy will be issued, stipulating for surrender of the old policy, demand for a new one within a specified period, or it may entitle the assured to a proportionate sum at all events, and so a policy may by its express terms be a nonforfeiture policy, and yet limit the condition as to nonforfeiture, by providing for a surrender within a certain time, and also

contain a forfeiture clause, and the court in an opinion in one case declares that such seemingly conflicting provisions exact a construction against the company most favorable to the insured.[1]

§ 1179. Nonforfeiture Statutes.— There are nonforfeiture statutes in several states.[2] The repeal of such statutes cannot affect contracts made thereunder,[3] nor are such statutes retroactive.[4] This is in conformity with general principles, and a statute is to be deemed retrospective or retroactive where it takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.[5] Whether the provisions of such statutes can be waived by agreement is doubtful. The statute is, however, undoubtedly for the benefit of the assured; its purpose is merely to establish a rule which shall enable the assured to reap the full benefit of premiums paid before default on his part, and at the same time to secure to the insurance company, in case it is obliged to pay, the full amount of the premiums which the terms of the policy call for.[6] The general rule applicable to waiver of statutory provisions has, however, been already considered.[7] Such statutes apply to foreign companies doing business in the state under compliance with its laws.[8]

§ 1180. Death as Affecting Right to Paid-up Policy. If the insured has defaulted in paying premiums, and

[1] See Insurance Co. v. Ducker, 95 U. S. 267.

[2] Deering's Annot. Civ. Code Cal., sec. 2766; 1 Mills' Stats. Colo. 1891, sec. 2223; Rev. Stats. Me. 1883, p. 460, sec. 91; and Pub. Laws, 1887, c. 71; Mass., 1880, c. 232, sec. 6; 1882, c. 119, secs. 159, 160; 1887, c. 217, sec. 76; 1 Gen. Stats. Mich. 1882, sec. 4232; 3 N. Y. Rev. Stats., 8th ed., p. 1688.

[3] McDonnell v. Alabama Gold L. Ins. Co., 85 Ala. 401.

[4] Section 1105, herein.

[5] Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483; 90 Am. Dec. 438.

[6] Carter v. John Hancock Mut. L. Ins. Co., 127 Mass. 153 (statement made by the court in arguing).

[7] See sec. 194, herein, "whether common or statutory law part of contract," and cases therein.

[8] Morris v. Pennsylvania etc. Ins. Co., 120 Mass. 503.

has become entitled to a paid-up policy, provided an application therefor is made within a specified time and the original policy transmitted, his death after such default and within such period does not defeat his right. The owner of the policy may after such death comply with said conditions, and become entitled to such paid-up policy, and, upon refusal to issue it, a liability is created for the amount for which it should have been issued.[9] If a policy on a husband's life is payable to the wife, her executors, administrators, or assigns, or, in case of her death, then to her children, and she is entitled to claim a paid-up policy after payment of two annual premiums on surrender of the policy, the husband is not entitled, on tendering payment, to a paid-up policy when she dies leaving no children before the payment of the second premium.[10]

§ 1181. When Only Paid-up Policy can be Claimed, and When the Full Amount of Insurance.—If the policy provides for nonforfeiture after payment of the first premium, and in case of default in payment of subsequent premiums, that the company will, upon surrender within thirty days after such default, issue a paid-up policy for an amount which could have been purchased with the net value of said policy, the contract is an insurance for the full amount of the policy until the time for the payment of the premium defaulted has expired. After such default it is only an insurance for such an amount paid up as the net value of the policy would then

[9] Wheeler v. Connecticut Mut. L. Ins. Co., 82 N. Y. 543; reversing s. c., 16 Hun (N. Y.), 317. In the case below, Daniels, J., dissented. In this case the court said: "The facts stated establish a demand for a paid-up policy. The fact that the insured was dead does not relieve the defendant from liability. The conditions were that two or more annual premiums should be paid, and then the application should be made within one year from default. This had been done. Although the insured was dead, the right to a paid-up policy or its value remained to his assignees. A refusal to perform thus created a liability for the amount for which the paid-up policy might have been issued."

[10] Continental L. Ins. Co. v. Hamilton, 41 Ohio St. 274. See chapters on beneficiaries herein.

purchase.[11] But it is held that if the prompt payment of the premium is waived by the company, it cannot then maintain a claim that the policy is only a paid-up one where it has not treated it as such by entry upon its books or otherwise, and has not notified the policy holder that it will so claim.[12] A demand for a paid-up policy and failure thereafter to pay premiums when due is declared to be an abandonment of a right to claim the full amount specified in the policy.[13]

§ 1182. Right to Claim Paid-up Policy.—No right to claim a paid-up policy exists against the company, nor is the company obligated to issue one unless it has so contracted,[14] but the contract is presumed to have been made in reference to valid statutes in force at the time of contracting,[15] and if the policy does not stipulate for a paid-up policy, but only that a default in payment of the premiums shall not work a forfeiture, and upon such default the amount due shall be reduced to the amount of premiums paid, equity will not decree issuing a paid-up policy in case the assured fails to pay his premiums. The rights under the policy may be obtained by an action after death.[16] It is held that the giving and accepting a note for the premium due on a policy after default may operate to destroy the right of the insured to a paid-up policy, although stipulated for in the policy, if the note is conditioned for absolute forfeiture of the contract if not paid at maturity.[17] If a life policy payable to the assured's children merely stipulates that after full payment of two or more premiums it becomes a paid-up nonforfeiture policy for certain "tenths," and also provides that there shall be no further liability for premiums therein, but that it is entitled to an ap-

[11] Mound City Mut. L. Ins. Co. v. Twining, 12 Kan. 475.

[12] Hanley v. Life Assn. of America, 69 Mo. 380.

[13] Ashbrook v. Phœnix Mut. L. Ins. Co., 94 Mo. 72; 3 Mo. (L. ed.) 907.

[14] Packard v. Connecticut Mut. L. Ins. Co., 9 Mo. App. 469.

[15] See sec. 194, herein.

[16] Harlow v. St. Louis etc. L. Ins. Co., 54 Mass. 425.

[17] Holley v. Metropolitan L. Ins. Co., 105 N. Y. 437.

portionment of the surplus in the ratio of its contribution thereto, neither the right to a paid-up policy nor the children's or company's rights can be enforced until after the assured's death.[18] The right to the surrender value of a policy is not lost where the assured surrenders the original policy to an agent with a request for a paid-up policy immediately after payment of a premium, but does not hear from the same until after the next premium becomes due, when it is given back to him, indorsed as forfeited, by another company to which the business of the original insurer has been transferred without the insured's knowledge.[19] The terms of the contract are not changed by representations of the agent, at the time the contract is made, that it is nonforfeitable when it does not so provide,[20] and the fact that the assured fails to read the policy does not aid him.[21]

§ **1183. Right of Infant to Paid-up Policy.**—If an infant whom the company may lawfully insure, and who is insured, elects to rescind after four years, payments of premiums under a policy for one thousand dollars, stipulating that after the payment of three of four annual premiums he will be entitled to a paid-up or nonparticipating policy for as many twentieths of the amount insured as there have been annual premiums paid, said assured is entitled to a paid-up nonparticipating policy for two hundred dollars, or may recover its cash "surrender" value.[22]

[18] Lyons v. Union Mut. L. Ins. Co., 63 Hun (N. Y.), 629; 44 N. Y. St. Rep. 581; 17 N. Y. Supp. 756.

[19] It appeared in this case that the contract provided for a paid-up policy upon default in payment of a premium, and the suit having been brought against the original company which had deposited certain moneys with the state authorities as an indemnity fund, he was held entitled to recover out of the fund: Lowell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264.

[20] Nashville Ins. Co. v. Matthews, 8 Lea (Tenn.), 499; Attorney General v. Continental L. Ins. Co., 93 N. Y. 70. But see Piedmont etc. Ins. Co. v. Young, 58 Ala. 476.

[21] Attorney General v. Continental L. Ins. Co., 93 N. Y. 70.

[22] Johnson v. Northwestern Mut. L. Ins. Co., 56 Minn. 365, 378, 379; 39 Cent. L. J. 337; 59 N. W. Rep. 992.

§ 1184. When Right to Claim Paid-up Policy Must be Exercised.[23]—The stipulation of the policy must determine when the right of election must be exercised. The policy may contain no limitation as to the time of election, but may provide only that upon default in the payment of the premiums the party will be entitled to a paid-up policy, or it may stipulate for compliance with certain conditions, such as surrender and demand within a limited specified time, or that demand and surrender must be made while the policy is in force.[24] It is held that if the paid-up policy is to be issued upon request upon default after payment of a specified number of annual premiums, and no time is specified,[25] or if no time is fixed,[26] the right of the assured to claim a paid-up policy is limited to the time during which the policy is in force.[27]

[23] See next section.

[24] The New York statute provides for demand and surrender within six months after lapse, and also for the exercise of an option for temporary or paid-up insurance, by giving notice at the same time with the demand, unless there be an agreement to the contrary expressed in the application or policy: 3 N. Y. Rev. Stats., 8th ed., p. 1688.

[25] Smith v. National L. Ins. Co., 103 Pa. St. 177; 49 Am. Rep. 121.

[26] Bussing v. Union Mut. L. Ins. Co., 34 Ohio St. 222; 8 Ins. L. J. 218.

[27] In a New York case (People v. Widows & Orphans' Ben. L. Ins. Co., 15 Hun (N. Y.), 8, decided in 1878), it was provided that the company should not be liable in case of default in nonpayment of the premiums when due, but that the policy in such case should be forfeited, conditioned that upon surrender duly receipted of the policy the company would issue a paid-up policy during the life of the person insured. Default was made, and a paid-up policy was not demanded until some years had elapsed; in the meantime the corporation had dissolved and receivers been appointed, and the court said that the application came too late; that if the petitioner could demand a paid-up policy after neglect to pay the premium when due, it could only be within a reasonable time thereafter, and adds: "But we are inclined to think no paid-up policy could legally be demanded after the forfeiture of the petitioner's policy by nonpayment of the premium. When the policy was forfeited for this or any other reason, it ceased to exist as a valid contract upon which this or any other application could be based." In a later case in the same state (Attorney General v. Continental Life Ins. Co., 93 N. Y. 70), decided in 1883, the policy was conditioned that after the payment of three or more annual premiums and a failure to make further payments when due, the

But it is decided in a Kentucky case that a provision that the insured shall forfeit his right to a paid-up policy unless he surrenders the policy within thirty days is not enforceable where a prospectus issued at the same time with the policy represents that the latter is nonforfeitable, and that the failure to pay a note at maturity, although the contract stipulated for forfeiture of the policy for its nonpayment, does not destroy his right to a paid-up policy, though it was terminated in other respects.[28] It is also decided that if the contract merely stipulates for a paid-up policy upon default in payment of the premiums, such policy may be demanded at any time.[29]

§ 1185. Right to Paid-up Policy Must be Exercised Within Specified Time.[30]—If it is expressly stipulated that the policy must be surrendered and receipted in full within a specified time after default in payment of a premium to entitle the assured to a paid-up policy, such provision must be complied with, and the option must be exercised within the time designated, otherwise it is lost, for time is of the essence of the contract. This rule accords with the weight of authority.[31] And the fact that the insurer was enjoined during the

company would, upon surrender within thirty days after said failure to pay, issue a paid-up policy for the proportion of the amount of insurance paid for. The policy was not surrendered or offered to be, and no paid-up policy was demanded. The company failed, and a receiver was appointed, and it was held that nonpayment of the premium and failure to surrender within the stipulated time absolutely forfeited the policy. It was also decided in this case that the fact that the company had suffered no damage by the assured's neglect to give notice of his election could not aid the latter.

[28] Southern Mut. L. Ins. Co. v. Montague, 84 Ky. 653; 2 S. W. Rep. 443.

[29] Lovell v. Mutual L. Ins. Co., 111 U. S. 264.

[30] See preceding section.

[31] See Hudson v. Knickerbocker L. Ins. Co., 28 N. J. Eq. 167; Knapp v. Homœopathic Mut. L. Ins. Co., 117 U. S. 411; Universal L. Ins. Co. v. Devore, 83 Va. 267, 270; 14 S. E. Rep. 532; 21 Ins. L. J. 337; 16 Va. L. J. 114; Smith v. National L. Ins. Co., 103 Pa. St. 177; Universal L. Ins. Co. v. Whitehead, 58 Mass. 226; 38 Am. Rep. 322; Phœnix Mut. L. Ins. Co. v. Baker, 85 Ill. 410; Chase v. Phœnix Mut. L. Ins. Co., 67 Me. 85; Koehler v. Phœnix Mut. L. Ins. Co., 4 Ky. L. Rep. 903.

specified time from issuing any policies is held not to excuse compliance with such condition as a condition precedent.[32] So if the policy provides for the return duly receipted within thirty days to entitle assured to a paid-up policy, such condition must be complied with;[33] and where the condition was that the paid-up policy should be issued for a proportionate amount on surrender of the policy "on or before it shall expire by the nonpayment of" certain premiums, the word "on" was held to mean that the right was lost to claim a paid-up policy the instant the policy expired by nonpayment of said premiums.[34] If the paid-up policy is to be demanded within one year from the time an accrued premium falls due, such provision refers to an accrued premium, for the nonpayment of which the company can determine the policy.[35]

§ 1186. Exceptions to Last Rule and Cases Contra.—It is held in Vermont that a demand within the specified time is not required, a reasonable time being sufficient.[36] If the failure to pay the premiums when due and to forward the policy within the specified time rests upon good and sufficient reasons, as where the company misdirected certain notices to the insured, and proceedings for dissolution and a receivership were instituted, and the neglect was also attributable to the company's agent, equity will relieve, and order the issuance of a paid-up policy.[37] So where the policy provided not only for its surrender within twelve months, but also that, in

[32] Universal L. Ins. Co. v. Whitehead, 58 Mass. 226; 38 Am. Rep. 322.

[33] The fact that a letter was written to the secretary by the attorneys, stating that the policy had been left with them for the purpose of procuring such policy, and demanding a paid-up policy, is not a sufficient complaint, although the letter also provided that on receipt of the term policy the original policy duly receipted would be forwarded: Universal L. Ins. Co. v. Devore, 88 Va. 778; 14 S. E. Rep. 532; 21 Ins. L. J. 337; 16 Va. L. J. 114.

[34] Sheever v. Manhattan L. Ins. Co., 20 Fed. Rep. 886; contrary held in same case, 16 Fed. Rep. 720.

[35] Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19.

[36] Bunce v. Life Ins. Co., 58 Vt. 253.

[37] Coffey v. Universal L. Ins. Co., 10 Biss. (C. C.) 354.

case of a default in payment of the premiums, the insurers should only be liable for the loss in a sum proportionate with the annual payments made, it was held that the insurers were liable for such proportionate amount, although the policy was not surrendered within the specified time.[38] In another case, where the facts were very similar to those in the last decision, the same ruling was made.[39] In the first of these two cases, however, the action was brought by the beneficiary of the policy, the insured having died nearly three years after the fifth annual premium became due, the insured then having paid a certain sum in cash, and given his note for the balance at three months, and received a renewal certificate, which note was never paid. In the latter case the policy was canceled by the company, although this was held not to affect the assured's right. It is also held that a surrender made in five years is sufficient.[40]

§ 1187. Whether Payment of Note Required to Entitle to Paid-up Policy.—Where the payment of premiums for a certain period is necessary to sustain a claim for a paid-up policy, and a note is given for a part or the whole of said premiums, the question whether payment of said note is a prerequisite to claiming said paid-up policy must necessarily depend upon the terms of the particular contract in question. It is pertinent to inquire in all cases what constitutes payment of an annual premium. Sometimes a note is accepted in place of cash. Such note may constitute payment so far as to prevent a forfeiture, or it may be accepted conditionally, a forfeitue to occur if it is not paid at maturity;[41] in other cases the premium is paid partly in cash and partly in premium notes. Again, the premium may be payable partly in cash, partly by payment of interest on outstanding notes, and partly in other notes, the notes to be

[38] Montgomery v. Phœnix L. Ins. Co., 14 Bush (Ky.), 51.

[39] Chase v. Phœnix etc. Ins. Co., 67 Me. 85. See Dorr v. Phœnix M. L. Ins. Co., 67 Me. 438.

[40] Southern Mut. L. Ins. Co. v. Montague, 84 Ky. 653.

[41] See c. xxxi, post.

canceled by application of dividends, and there are other schemes of insurance,[42] so that the court is bound in every case to closely examine the contract, and apply the rules of construction governing in like cases as far as possible in order to discover the intent of the parties. If a policy provides that the assured shall be entitled to a paid-up policy after the payment of two annual premiums, and notes are given for the second year's premium, the assured is not entitled to a paid-up policy until the notes are satisfied.[43] But where the agreement is that the assured is to make certain semi-annual cash payments, execute annual notes for a portion of the premium, and to pay annually the interest falling due on such notes, and the payment of the principal of the notes is otherwise provided for by the application of dividends and by a deduction of the unpaid portion of the notes from the amount due on the policy when payable, the two complete annual payments of premium required are made when said annual cash premiums, together with the annual interest on the notes, are paid and notes given for the balance of the premiums as stipulated. Such premium notes need not be paid to entitle the assured to a paid-up policy.[44] And to the same effect is an Ohio case.[45] So in another case an endowment policy for ten years stipulated that upon default the assured should be entitled at its maturity to as many tenths as there had been complete annual payments, provided that all the premium notes should be taken up or the interest thereon paid in cash when the premium matured, until the notes were canceled by dividends, otherwise the policy would be forfeited, unless one or more annual payments had been fully made in cash or by application of the surplus. It was held that the assured could either pay the premium in cash and take up the notes for the specified years, and thereby become entitled to said

[42] See c. xxxi, post.

[43] Moses v. Brooklyn L. Ins. Co., 50 Ga. 196.

[44] Olide v. Northwestern Mut. L. Ins. Co., 40 Iowa, 357.

[45] Northwestern Mut. L. Ins. Co. v. Bonner, 36 Ohio St. 51. Although it was held in this case that by the nonpayment of further annual premiums, and the annual interest due on prior notes, the right of the policy holders to share in future dividends was lost.

"tenths," or that, if he was in default for payment of premiums, he could pay the annual interest on the notes until they were satisfied by the dividends, and would be entitled to as many tenths as he had so paid, and so much of the notes as were unsatisfied after the return of application of dividends should be deducted.[46] So it is held that if the note only extends the time of payment of an overdue premium, and there is an express stipulation that its nonpayment at maturity shall absolutely forfeit all claims of the insured under the contract, its nonpayment at maturity deprives the assured of all right to demand a paid-up policy within thirty days from the time it falls due, even though the policy provides for such paid-up policy upon demand within thirty days after default in payment of a premium.[47] It is also held that if notes are given of a third party in payment of the annual premiums, and renewal receipts are given, the payment of the notes is not a condition to be complied with as one precedent to claiming a paid-up policy.[48]

§ 1188. When Paid-up Policy Forfeited—Cases.—Where the original policy was conditioned for the payment of interest on the premium notes, and the new policy is made subject to the conditions of the original policy, a failure for two years to pay said interest forfeits the paid-up policy.[49] So if the new policy provides for forfeiture for nonpayment of the interest on the premium note, notice of the maturity of said interest is not required to be given.[50] So if a paid-up policy is issued, and the insured gives his promissory note in form of a loan for the amount of the credit portions on the original

[46] Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988.

[47] Holly v. Metropolitan L. Ins. Co., 105 N. Y. 437; 11 N. E. Rep. 507. See Dutcher v. Brooklyn L. Ins. Co., 3 Dill. (C. C.) 87; affirmed, Insurance Co. v. Ducker, 95 U. S. 269, cited in Gardner v. Central L. Ins. Co., 5 Fed. Rep. 430.

[48] Michigan etc. Ins. Co. v. Bowes, 42 Mich. 19.

[49] Holman v. Continental L. Ins. Co., 54 Conn. 195 (two judges dissenting). See, also, Ewald v. Northwestern Mut. L. Ins. Co., 60 Wis. 431.

[50] Heim v. Metropolitan L. Ins. Co., 7 Daly (N. Y.), 536.

policy, and the new policy stipulates for the payment of interest thereon each year, otherwise that the policy will be void without notice, a default in payment of said interest operates to forfeit the policy.[51] So the paid-up policy is forfeited where the insured never pays anything, on either the note or interest, notwithstanding the policy is expressed as a paid-up policy, and has on its margin the words, "nonforfeiture" policy,[52] and where the new policy was indorsed as being conditional on the payment of interest on two certain notes given in part payment of premiums in advance, nonpayment thereof as specified forfeits the policy.[53] A paid-up policy of life insurance may be forfeited by nonpayment of interest on premium notes given for premiums accruing while the original policy remained in force.[54]

§ 1189. When Paid-up Policy not Forfeited—Cases. Where a paid-up policy is conditioned upon the payment of a certain amount of interest annually and of all outstanding loans, and such sum is the interest only on a loan, and not a premium, the policy is not forfeited by its nonpayment;[55] nor is a "nonforfeiture, paid-up" policy of life insurance forfeited by a failure to pay interest on premium notes regarded by the company as a loan to the assured;[56] and failure to pay a note for the premium given after a right to a paid-up policy has accrued does not forfeit the policy.[57] So if the policy is "nonforfeiting," it is not forfeited for failure to pay notes given for premiums on the original policy for which the paid-up

[51] Knickerbocker L. Ins. Co. v. Harlan, 56 Miss. 512. See Alabama Gold L. Ins. Co. v. Thomas, 74 Ala. 578.

[52] McQuitty v. Continental L. Ins. Co., 15 R. I. 573; 10 Atl. Rep. 635.

[53] Patch v. Phœnix etc. Ins. Co., 44 Vt. 481. See Moser v. Phœnix M. L. Ins. Co., 2 Mo. App. 408.

[54] Holman v. Continental L. Ins. Co., 54 Conn. 195; 1 Am. St. Rep. 97.

[55] Gardner v. Central L. Ins. Co., 5 Fed. Rep. 430; citing Grigsby v. Insurance Co., 10 Bush (Ky.), 310; Insurance Co. v. Ducker, 95 U. S. 269.

[56] Bruce v. Continental L. Ins. Co., 58 Vt. 253.

[57] Tutt v. Covenant Mut. L. Ins. Co., 19 Mo. App. 677.

policy is exchanged, where it is also stipulated that any indebtedness of the assured to the company may be deducted upon payment of the policy. In such case the amount of said notes is to be deducted from the paid-up policy.[58] A policy is not forfeited in Kentucky by the failure to pay interest on premium notes at maturity where the company is entitled to recover on the notes.[59] Again, where a paid-up policy is issued subject to the payment annually in advance of interest on the premium notes, otherwise to be forfeited, payment thereof on the day following that specified is not in time, although reliance has been placed, in making such delay, upon a pamphlet issued by the company, and which accompanied the original policy, and which stated that all the company's policies were nonforfeitable, and that it allowed thirty days' grace in the payment of premiums; the company not being estopped in such case to claim a forfeiture for nonpayment.[60]

§ 1190. Whether it is New Contract or Continuation of Old One.—Sometimes an indorsement is made upon the old policy, which is equivalent to a conversion into a paid-up policy.[61] Such indorsement is in connection with the provisions

[58] Eddy v. Phœnix Mut. L. Ins. Co., 65 N. H. 27, 28; 18 Atl. Rep. 89. "It contains a provision for the payment of any indebtedness to the company by deducting it from the amount of insurance secured by the policy, and the failure to pay the interest in advance upon the notes given on the original policy is to be treated as an indebtedness to the company, and not as a forfeiture of the 'paid-up' policy": Id. 28, per Clark, J., citing Cowles v. Continental L. Ins. Co., 63 N. H. 200; Montgomery v. Phœnix Mut. L. Ins. Co., 14 Bush (Ky.), 59; Cole v. Knickerbocker Ins. Co., 63 How. Pr. (N. Y.) 445; Northwestern L. Ins. Co. v. Little, 56 Ind. 504; Olide v. Northwestern L. Ins. Co., 40 Iowa, 357; Symonds v. Northwestern L. Ins. Co., 23 Minn. 491; Hull v. Northwestern L. Ins. Co., 39 Wis. 397; Franklin L. Ins. Co. v. Wallace, 93 Ind. 17; Northwestern L. Ins. Co. v. Fort, 82 Ky. 269; St. Louis M. L. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310.

[59] Northwestern Mut. L. Ins. Co. v. Fort, 82 Ky. 269.

[60] Fowler v. Metropolitan L. Ins. Co., 116 N. Y. 389; reversing 41 Hun (N. Y.), 357; Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276; and Ruse v. Mutual B. L. Ins. Co., 23 N. Y. 516; 24 N. Y. 653, distinguished.

[61] See Holman v. Continental L. Ins. Co., 54 Conn. 195; Alabama Gold L. Ins. Co. v. Thomas, 74 Ala. 578; McQuitty v. Continental L. Ins. Co., 15 R. I. 573; 10 Atl. Rep. 635.

of the policy relating to forfeiture for nonpayment of premiums;[62] and where the company wrote across the face of the policy that it was binding for two-fifteenths thereof, "subject to the terms and conditions expressed in this policy," it was held that the paid-up policy was only the original policy reduced to an amount corresponding to the premiums paid.[63] And it is held in other cases that the paid-up policy is a continuation of the old one, so far as the stipulations of the former are applicable.[64] So, in general, a new policy may contain a provision in conformity to the original for which it is substituted, providing for forfeiture, if the interest on the premium note is unpaid, although there are exceptions;[65] for the company may validly insert such a condition where it has authority to impose an obligation on the assured to pay such interest on notes outstanding at the issue of the new policy.[66] But otherwise not, for it cannot insert such a provision where it is not in the original policy and is unwarranted by its terms.[67] It is decided, however, that the company may make the new policy strictly forfeitable for a default in paying premiums or premium notes, and is not obligated to insert a provision in the original "nonforfeitable" policy which stipulates differently.[68] It is held that a forfeiture condition as to residence under the original policy does not affect the new policy.[69]

[62] Alabama Gold L. Ins. Co. v. Thomas, 74 Ala. 578.

[63] McQuitty v. Continental L. Ins. Co., 15 R. I. 573; 10 Atl. Rep. 635. See Holman v. Continental L. Ins. Co., 54 Conn. 195; 8 East Rep. 181; People v. Knickerbocker L. Ins. Co., 103 N. Y. 48.

[64] McDonnell v. Alabama Gold L. Ins. Co., 85 Ala. 401; Merritt v. Cotton States Ins. Co., 55 Ga. 103.

[65] See cases cited in two preceding sections.

[66] People v. Knickerbocker L. Ins. Co., 103 N. Y. 480.

[67] Cole v. Knickerbocker L. Ins. Co., 23 Hun (N. Y.), 255; 63 How. Pr. (N. Y.) 442.

[68] People v. Knickerbocker L. Ins. Co., 103 N. Y. 480. The New York statute provides that the paid-up insurance purchased shall be payable at the same time and under the same conditions, except as to the payment of premiums, as the original policy: 3 N. Y. Rev. Stats., 8th ed., p. 1688. That new policy is not new contract in case of endowment policies, see sec. 1193, note 84, herein.

[69] Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220.

§ 1191. Amount of Premium under Statutes "Deducting Indebtedness."—Some discussion has been had upon question as to what constitutes an "indebtedness" to be deducted under the statutes providing therefor, in ascertaining the "single premium" remaining to the credit of the insured. In Massachusetts, the statute provides for the continuance and validity of the policy for a limited period after failure to pay the premium, to be determined as therein provided. The net value is to be ascertained in a certain manner, and from it is to be deducted "any indebtedness to the company or notes" of the assured held by it, which if given for the premium are to be canceled, and "four-fifths of what remains" constitutes a net single premium for temporary insurance for a term to be determined as specified therein.[70] The New York statute provides for "deducting any indebtedness of the insured on account of any annual, semi-annual, or quarterly premiums then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing."[71] Such statute is not violated by a stipulation in the policy that the unpaid portion of the year's premium shall be considered an indebtedness to the company, and the failure to pay any premium when due operates to forfeit the policy except as provided by the statute.[72] And where such a condition exists, the unpaid portion of the premium must be deducted from the net value at the date the premium becomes due in ascertaining the net single premium under the statute.[73] But where there is no such stipulation an unpaid portion of a half year's premium is not an "indebtedness," and cannot be deducted.[74]

[70] Mass. Stats. 1861, c. 186, sec. 1; Stats. 1882, c. 119, sec. 159.

[71] 3 N. Y. Rev. Stats., 8th ed., p. 1688.

[72] Van Crielen v. Massachusetts Mut. L. Ins. Co., 35 La. Ann. 226, under Mass. Laws, 1861, c. 186.

[73] Van Crielen v. Massachusetts Mut. L. Ins. Co., 35 La. Ann. 226; Howard v. Continental L. Ins. Co., 48 Cal. 229; 2 Deering's Digest, 1542.

[74] Goodwin v. Massachusetts Mut. L. Ins. Co., 73 N. Y. 480. This latter decision rests upon the distinction between a premium of insurance and a debt. The policy itself also provided that whatever was due to the company should be deducted from the net value of

§ **1192. Amount of Paid-up Policy.**—In estimating the amount for which a paid-up policy should issue, the holder is not entitled to the full amount of the premiums paid, but only to an equivalent of the present value of the policy, nor should a method of computation be used which deprives the company of its earnings for carrying the risk.[75] Thus, it is an error to require the company to issue a policy for the aggregate amount of the premiums paid subject to the amount due on the note.[76] If annual premium notes are given on which only the interest, together with cash premiums, is to be paid annually, they need not be deducted in determining the amount, where the insured is entitled to a paid-up policy, for as many "tenths" as complete annual payments have been made.[77] But where an endowment policy with premiums payable for ten years was so worded that complete annual payments might be made in cash, and cash payments of the interest on annual premium notes, the payment of the notes being provided for by application of the surplus, it was held that the notes, so far as uncanceled, might when the policy became due be deducted from the amount payable under the paid-up policy;[78] and in another like case it was held that the premium notes with their accrued interest should be deducted, it being so provided by the policy, from the amount payable,[79] and it is so decided in a Georgia case with similar provisions.[80] It is also so de-

the policy, including any unpaid premium notes with interest, but no notes were held by the defendant against the insured, and there was no direct promise by him to pay any amount, nor any obligation so to do. One-half year's premium had been paid upon the policy when issued, and when the insurer died said period had elapsed, and the other half year's premium was unpaid. It was claimed that the policy lapsed when the first six months expired: See, also, Pitt v. Berkshire L. Ins. Co., 100 Mass. 500.

[75] Mound City Mut. L. Ins. Co. v. Heath, 49 Ala. 529; Farley v. Union Mut. L. Ins. Co., 41 Hun (N. Y.), 303.

[76] Farley v. Union Mut. L. Ins. Co., 41 Hun (N. Y.), 303.

[77] Fittnan v. Northwestern L. Ins. Co., 4 Mo. App. 386; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269; affirming 3 Dill. (C. C.) 87.

[78] Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988.

[79] Olide v. Northwestern etc. Ins. Co., 40 Iowa, 357.

[80] Northwestern Mut. L. Ins. Co. v. Ross, 63 Ga. 199.

cided in an Ohio case.[81] Where the policy provided for an amount proportionate to the number of premiums paid, and prior to his death twenty-seven quarterly premiums were paid by the assured, who then defaulted, and four quarterly premiums became due and were unpaid, a recovery for twenty-seven thirty-oneths of the amount of the policy, with interest in the discretion of the court on said amount from the commencement of the action, was adjudged.[82]

§ 1193. Endowment Policy—Nonforfeiture Statutes. In a Massachusetts case the policy was payable in case of death within the ten years, but to the insured if he survived that period. The policy was conditioned to be forfeited for nonpayment of premiums when due, subject, however, to the provisions of the Massachusetts statute.[83] The insured survived the endowment period, of which the company had due notice, but he had failed to pay the last premium. It was held that he was entitled to recover the full amount of the policy, less the amount due the company with interest thereon.[84]

[81] Northwestern Mut. L. Ins. Co. v. Bonner, 36 Ohio St. 51. In a New York case an option was given to receive, after payment of two annual premiums, a paid-up policy for the full amount of the premiums paid. The policy was for three thousand dollars, and the annual premium three hundred and eighty-nine dollars and sixteen cents. After ten annual payments a demand was made for a paid-up policy for the amount of premiums paid. The court held that as the policy contained no words of restriction, the plaintiff's right was not limited to the amount of the original insurance, but that he was entitled to a paid-up policy as stipulated: Christy v. Homœopathic Mut. L. Ins. Co., 93 N. Y. 345.

[82] Baltimore Mut. L. Ins. Co. v. Bratt, 55 Md. 200.

[83] Stats. 1861, c. 186.

[84] Carter v. John Hancock Ins. Co., 127 Mass. 153. The court said that the effect of incorporating the statute into such a policy was not "to make a new contract between the parties, nor to make any change in the time when the amount of the policy becomes payable. . . . . When the statute provisions are adopted in an endowment policy for the purpose of qualifying the forfeiture clause, the clause thus qualified is to be so construed as to give the insured its full benefit, without altering any other provision of the policy, if this can be done without violating any rule of law. In the endowment policy the expiration of ten years from its date is

§ 1194. Refusal to Issue Paid-up Policy.—As a rule a party has a right to insist upon the issue of a paid-up policy where the contract stipulates therefor, provided he himself has performed the conditions of the contract on his part necessary to be performed to entitle him to claim the enforcement of the terms of the contract, unless of course such nonperformance by the insured has been waived, or an estoppel has arisen, or the case is otherwise one where relief could be granted,[85] and where the failure to pay the premium on a policy at the specified time terminates the contract, and no application for a paid-up policy is made, the contract will not be continued in force for the full amount, even if the company refuses to issue a paid-up policy.[86]

§ 1195. Refusal to Issue Paid-up Policy—Measure of Damages.[87]—If there is an existing risk and the premiums paid are earned, and the party demanding the same is entitled to have a paid-up policy issued, the measure of damages is the value of the policy at the time of the demand and refusal, with interest.[88] And where the assured under a nonforfeitable policy is entitled to participate in the profits, and an action is brought to recover damages for a breach of contract to make a settlement, it is error to withdraw from the

the occurrence of an event on the happening of which the policy becomes payable," and that in this case the policy was not payable only in case of death within the term of temporary insurance, and the New York statute, so much of it as is applicable to endowment insurance, contemplates a payment at the end of the term of the policy in case the insured survives the term. "If the reserve upon any endowment policy, applied, according to the preceding section, as a single premium of temporary insurance, be more than sufficient to continue the insurance till the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term on the conditions on which the original policy was issued": 3 N. Y. Rev. Stats., 8th ed., p. 1688.

[85] Standley v. Northwestern Mut. L. Ins. Co., 95 Ind. 254.

[86] Ashbrook v. Phœnix Mut. Ins. Co., 94 Mo. 72; 6 S. W. Rep. 462; 12 West. Rep. 613.

[87] See sec. 1191. herein.

[88] Rumbold v. Pennsylvania Mut. L. Ins. Co., 7 Mo. App. 71. See Mutual L. Ins. Co. v. Bratt, 55 Md. 200; Nashville L. Ins. Co. v. Matthews, 8 Lea (Tenn.), 499.

consideration of the jury the reserved fund and financial standing of the company. The equitable value of the policy being dependent on the reserve, it is material to show the financial standing in order to ascertain how much of the reserve could be safely applied in settlement.[89]

[89] Nashville L. Ins. Co. v. Matthews, 8 Lea (Tenn.), 499.

CHAPTER XXXI.

NOTES FOR PREMIUMS, AND PREMIUM, ETC., NOTES.

§1202. Payment by note.
§1203. Premium note and policy one contract.
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§1207. Payment by negotiable paper—Cases holding no demand or notice necessary—Forfeiture.
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§1211. When condition for forfeiture is in note only.
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§1220. Validity of provisions as to premium, etc., notes.
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§1227. Liability after suspension on note for entire premium.
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§1234. Tender: Premium notes.
§1235. Payment of premium notes or interest thereon by dividends or profits.
§1236. Effect of non-payment of note upon beneficiary.
§1237. Deduction of note from loss.
§1238. Counter-claim on note of owner of vessel insured for benefit of mortgagee.
§1239. Amount of recovery on premium notes.

§ 1202. Payment by Note.—Insurance companies have implied power to accept promissory notes in payment of the premium, and such payment is good, and an agent with the necessary authority therefor may accept such note,[1] even

[1] McIntire v. Preston, 5 Gilm. (Ill.) 48; 48 Am. Dec. 321; Pitt v. Berkshire L. Ins. Co., 100 Mass. 500; Home Ins. Co. v. Curtis, 32 Mich. 402; Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush (Ky.), 430; New York L. Ins. Co. v. McGowan, 18 Kan. 300; Farmers' Bank v. Maxwell, 32 N. Y. 579; Mowry v. Home Ins. Co., 9 R. I. 346; Marcus v. St. Louis M. L. Ins. Co., 68 N. Y. 625; Jacoway v. Insurance Co., 49 Ark. 320. Emerigon (Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 6, p. 68), referring to Pothier, notes a custom to give promissory notes for the premium. See secs. 76, 197, 550, 553, herein. As to premium notes in mutual fire companies, see 1 Homer's Annot. Stat. Ind. 1896, sec. 3752, citing as to recovery of assessments on premium notes: Hubler v. Taylor, 20 Ind. 346; German etc. Co. v. Franck, 22 Ind. 364; Sinnissippi Ins. Co. v. Taft, 26 Ind. 240; Keller v. Equitable Ins. Co., 28 Ind. 170; Bersch v. Sinnissippi Ins. Co., 28 Ind. 64; Boland v. Whitman, 33 Ind. 64; Whitman v. Meissner, 34 Ind. 487; Embree v. Shideler, 36 Ind. 423; Manlove v. Naylor, 38 Ind. 424; Manlove v. Burger, 38 Ind. 211; Downs v. Hammond, 47 Ind. 131. See, also, 2 Burns' Ind. Rev. Stat., p. 704, sec. 4883, citing Clark v. Manufacturers' Co., 130 Ind. 332, and other cases, noted above. As to premium notes in mutual fire companies, married woman's note valid, premium reserve, assessments on premium notes, see Rev. Stats. Me. 1883, p. 447, c. 49, secs. 26, 27; as amended 1895, c. 95, p. 94. See Freeman's Supp. 1885-95, p. 305, and as cited in Stats. 1883. See New England Mut. F. Ins. Co. v. Butler, 34 Me. 453; Maine Mut. M. Ins. Co. v. Swanton, 49 Me. 448; Maine Mut. M. Ins. Co. v. Neal, 50 Me. 305; York Co. Mut. F. Ins. Co. v. Turner, 53 Me. 226; Union Ins. Co. v. Greenleaf, 64 Me. 128. As to deposit notes ofmutual fire companies, see Supp. Pub. Stats. Mass. 1882-88, p. 526, c. 214, sec. 46 (Pub. Stat. 119, secs. 113-15). As to assessments, see Id., p. 526, sec. 47, et seq., and Crocker's Notes 1891, on Pub. Stats., pp. 271, 272. When mutual fire companies may refuse premium notes in part payment of insurance: Gen. Laws R. I., 1896, p. 566, c. 181, tit. 19, sec. 16. Construction of statutes relating to mutual companies and premium notes: Corey v. Sherman (Iowa, 1894), 60 N. W. Rep.

though the policy provides for a cash payment;[2] and if the policy provides that the note shall not be a payment, but only an extension of the time of payment of the premium, and that if not paid in full when due the company shall not be liable while the note remains unpaid, such payment by note is good until the note is dishonored, and the delivery of the policy is a sufficient consideration for the note.[3] So the company may extend the time for the payment of a note given for the premium, the obligation to pay future premiums being a sufficient consideration for an agreement made before default.[4] And if a note is taken for the premium due and a renewal receipt is given, it constitutes a payment sufficient to prevent a forfeiture.[5] A note given for the premium on an open marine policy executed to cover such notes as may be afterward indorsed thereon becomes valid as fast as risks are assumed to the extent of the premiums actually earned by the company, and to this extent only the maker of the note becomes liable to the company.[6] In case of a mutual company, if its charter provides for a specific rate of premium to be paid in cash in the same manner as in companies other than mutual ones, the object thereof being to enable the company to issue policies on the mutual and nonmutual plan, it may accept a note for the premium, such note being a mere extension of the time of payment.[7] So the note of a third party

232; Code of Iowa, secs. 1146, 1150, 1160. If assessment on deposit note not paid directors may sue: Rev. Stats. Me. 1883, p. 447, sec. 29, citing York Co. Mut. F. Ins. Co. v. Knight, 48 Me. 78. Insured not liable beyond amount of deposit note: Rev. Stats. Me. 1883, p. 447, c. 49, sec. 27.

[2] Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush (Ky.), 430; Cary v Nagel, 2 Biss. (C. C.) 244.

[3] Marskly v. Turner (Mich.), 45 N. W. Rep. 644.

[4] Michigan Mut. L. Ins. Co. v. Custer, 128 Ind. 25; 27 N. E. Rep. 124.

[5] Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19.

[6] Furniss v. Gilchrist, 1 Sand. (N. Y.) 53; Maine etc. Marine Ins. Co. v. Stockwell, 67 Me. 382.

[7] Curry v. Nagel, 2 Biss. (C. C.) 244; 2 Abb. (U. S.) 156. As to acceptance of draft and laches of company, see Pendleton v. Knickerbocker L. Ins. Co., 5 Fed. Rep. 238. Consent was, however, given to such deduction in this case.

may be accepted as payment of the premium.[8] If an insurance agent agrees with another who holds his note that he secure an application, and that the premium be paid by an indorsement on said note, there is no payment of the premium where the policy is not delivered and no indorsement made on the note, the insured having deceased before said acts are done, especially where the policy is required to be delivered and the premium paid during insured's lifetime.[9] A general agent may accept a third party's note as payment, even though the policy provides for a cash premium.[10] Payment of the first premium by note is sufficient where the agent takes the note himself and advances the amount to the company.[11] So the company may accept the notes of a husband as payment of the premium due on a policy on his life for his wife's benefit,[12] and in such case the company is precluded from insisting that such notes do not constitute payment.[13] But a partnership is not bound by a note given by a member of a firm in the firm name for the premium on an insurance of such member's property, such act not being within the scope of the partner's authority to bind the firm.[14] As a general rule, the premium note of an insurance broker received by the insurers

[8] Franklin L. Ins. Co. v. Wallace, 93 Ind. 7; Shaw v. Republic L. Ins. Co., 69 N. Y. 286; Timayens v. Union Mut. L. Ins. Co., 21 Fed. Rep. 223. But see Mutual etc. Ins. Co. v. Davis, 12 N. Y. (2 Kern.) 569, as to right of mutual company to take note of third person having no interest in policy.

[9] Hawley v. Michigan Mut. L. Ins. Co. (Iowa, 1895), 61 N. W. Rep. 201; 24 Ins. L. J. 216.

[10] Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush (Ky.), 430.

[11] Krause v. Equitable L. Assur. Soc., 99 Mich. 461; 58 N. W. Rep. 496. It is held in the superior court in Kentucky that if the insured gives a note for the first premium payable to the agent as "agent," and this is accepted by the company, it is a note received for the premium, and its nonpayment at maturity forfeits the policy; the latter stipulating that if notes for premiums be not paid, there shall be a forfeiture, and it is also held that this ruling is not changed by the fact that the agent had receipted for the premium as for a cash premium paid: Union Cent. L. Ins. Co. v. Duvall (Ky. Sup. Ct. 1895), 16 Ky. L. Rep. 398.

[12] Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19.

[13] Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19.

[14] Lime Rock F. & M. Ins. Co. v. Treat, 58 Me. 415.

in payment of a policy for his principal discharges the principal from liability to the insurers on account of the premium.[15]

§ **1203. Premium Note and Policy One Contract.**—A premium note and life policy executed at the same time are one contract.[16]

§ **1204. Condition as to Forfeiture for Nonpayment of Note at Maturity—Generally.**—Although a note may be given and accepted as payment of the premium, it is not a payment when accepted conditionally. Thus, the policy may provide for forfeiture upon nonpayment of the note at maturity or within a limited time thereafter, and in case of a breach such condition controls, and courts will always permit it to be shown that the parties did not intend that a note should be considered payment unless paid when due.[17] Frequently the policy only provides for a suspension of the risk, as that it shall be void while the note remains overdue and unpaid,[18] or that the company shall not be liable for a loss

[15] Union Ins. Co. v. Grant, 68 Me. 229; 28 Am. Rep. 42.

[16] Laughlin v. Fidelity Mut. L. Ins. Co. (Tex. Civ. App. 1894), 28 S. W. Rep. 411. A policy issued by a life, fire, or marine insurance company, domestic or foreign, and a deposit note given therefor, is one contract, under Rev. Stats. Me. 1883, p. 447, c. 49, sec. 27.

[17] Shultz v. Hawkeye Ins. Co., 42 Iowa, 239; Shakey v. Hawkeye Ins. Co., 44 Iowa, 540; Continental L. Ins. Co. v. Daly, 33 Kan. 601; Pitt v. Berkshire etc. Ins. Co., 100 Mass. 500; Sims v. State Ins. Co., 47 Mo. 54; Baker v. Union L. Ins. Co., 43 N. Y. 283; 6 Abb. Pr., N. S. (N. Y.), 144; 37 How. Pr. (N. Y.) 126; Roehner v. Knickerbocker L. Ins. Co., 4 Daly (N. Y.), 512; Holly v. Metropolitan L. Ins. Co., 105 N. Y. 437; Roberts v. New England L. Ins. Co., 1 Disn. (Ohio) 355; 2 Disn. (Ohio) 106; Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696; Thompson v. Insurance Co., 104 U. S. 252; 2 Wood (C. C.), 457; Muhlman v. National Ins. Co., 6 W. Va. 580; Gertin v. Dodge etc. Co., 39 Wis. 121; Neil v. Union Mut. L. Ins. Co., 45 U. C. Q. B. 593.

[18] Continental L. Ins. Co. v. Dorman (Ind.), 25 N. E. Rep. 213; Williams v. Albany City Ins. Co., 19 Mich. 451; 2 Am. Rep. 95; Sims v. State Ins. Co., 47 Mo. 54; 4 Am. Rep. 311; Wall v. Home Ins. Co., 36 N. Y. 157; 8 Bosw. (N. Y.) 597; Kirk v. Dodge Co. Mut. Ins. Co., 39 Wis. 138; Robinson v. Continental Ins. Co., 76 Mich. 641; 43 N. W. Rep. 648; Williams v. Republic Ins. Co., 19 Mich. 469.

occurring while such note remains due and unpaid.[19] Sometimes the note itself contains such provision for forfeiture in case of its nonpayment when due, although such condition does not have the same force as if contained in the policy.[20] The policy sometimes also provides that in case a note given for a premium shall not be paid at maturity, the policy shall be void without notice to any person or persons interested therein;[21] or both policy and note frequently stipulate for forfeiture in case of such nonpayment of the note.[22] In some cases there is no provision in either note or policy for forfeiture in case of nonpayment of the note, either at maturity or within a limited time thereafter,[23] and in one case a printed memorandum on the margin of the policy provided that the same should be forfeited on nonpayment of a promissory note given for the premium.[24]

§ **1205. Validity of Such Provisions.**—It is undoubted that such conditions may be validly entered into between the parties, and become a part of the contract of insurance, binding upon the parties and enforceable;[25] they are neither against public policy, unwise, illegal, nor unreasonable, nor

[19] Robinson v. Continental Ins. Co., 76 Mich. 641; 43 N. W. Rep. 648; Continental L. Ins. Co. v. Miller, 4 Ind. App. 553.

[20] Dwelling-House Ins. Co. v. Haidie, 37 Kan. 674; 16 Pac. Rep. 92; Mutual L. Ins. Co. v. French, 30 Ohio St. 240; 27 Am. Rep. 443; Montgomery v. Phœnix Mut. L. Ins. Co., 14 Bush (Ky.), 51; Hastings v. Brooklyn L. Ins. Co., 44 N. Y. St. Rep. 37; 17 N. Y. Supp. 333.

[21] Thompson v. Knickerbocker L. Ins. Co., 2 Wood (C. C.), 547; Pendleton v. Knickerbocker L. Ins. Co., 5 Fed. Rep. 238.

[22] Cardwell v. Republic Ins. Co., 7 Chi. Leg. News, 282; Pitt v. Berkshire etc. Ins. Co., 100 Mass. 500.

[23] New England L. Ins. Co. v. Hasbrouck, 32 Ind. 447; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543; McAllister v. New England L. Ins. Co., 101 Mass. 558.

[24] Baker v. Union etc. Ins. Co., 6 Rob. (N. Y.) 393.

[25] Continental L. Ins. Co. v. Daly, 33 Kan. 601; Shakey v. Hawkeye Ins. Co., 44 Iowa, 540; Blackerby v. Continental Ins. Co., 83 Ky. 574; 15 Ins. L. J. 756, per the court; Phœnix Ins. Co. v. Bachelder, 32 Neb. 490, per Norval, J. "The parties may insert what conditions they please in a policy, provided there be nothing in them contrary to criminal law or public policy. This is constantly done in marine policies, and the principle extends to all other policies": Beadle v.

is it against public policy for the insurer to take advantage of such clauses.[26] So a condition is valid in a mutual company's policy that if a note taken for a cash premium is not paid within sixty days after due, "all obligations of the company to the insured until such note is paid are suspended."[27]

§ 1206. Payment by Negotiable Paper—Demand or Notice, etc.—Forfeiture.—In some cases a question has been raised whether when a note or other negotiable paper has been given for the premium a presentment and demand or notice is necessary to enable the company to declare a forfeiture. In a Wisconsin case it is held that if the maker of a note given for the premiums promises absolutely to pay to the order of the payee a certain sum at a fixed time, its negotiable character is not affected by the fact that it is also agreed in such note that in case of its nonpayment at maturity the entire premium shall be considered as earned, and the policy void during such time as the note remains overdue and unpaid.[28] The federal court has decided that the insurance company is bound to present a draft at maturity where it has taken the same in payment of a premium, and that it must not only present the bill for acceptance or payment, but must give the necessary legal notice on refusal to accept or pay the same as would be required of any other holder of commercial paper; that such bill is negotiable under the law merchant, and entitled to protest and notice, which must be given or excused to entitle the company to claim a forfeiture, even though the policy and bill itself both provide that the policy shall be-

Chenango Mut. Ins. Co., 3 Hill (N. Y.), 161; cited with approval in Robert v. New England Mut. L. Ins. Co., 1 Disn. (Ohio) 355; s. c., 2 Disn. (Ohio) 106.

[26] Roehner v. Knickerbocker L. Ins. Co., 63 N. Y. 160, 164, 167, per Folger, J.

[27] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111.

[28] Kirk v. Dodge Co. Mut. Ins. Co., 39 Wis. 138. See Joliffe v. Insurance Co., 39 Wis. 119. If a premium note is conditioned to be void for nonpayment when due, without notice being given the parties, or other act required of the company, such nonpayment avoids the insurance contract without formal notice of cancellation: Union Cent. L. Ins. Co. v. Chowning (Tex. C. C. A. 1894), 28 S. W. Rep. 117.

come void if the bill is not paid at maturity, and the policy provides that notice need not be given to any party or parties interested therein.[29] And the supreme court of the United States has declared that presentment must be made in such case, even though the drawer of the bill has refused acceptance, and has no funds for payment, but that no protest is necessary for nonacceptance or nonpayment.[30] The nonpayment of a note given in payment of the first premium to an agent does not avoid the policy where the agent is liable to the company for the cash premium.[31] In a Kentucky case the note was given to a foreign company. Both the policy and note were conditional that the insurance should be void in case of nonpayment of the note when due, although the policy provided certain terms on which it might be revived; no place of payment was specified in the note, and neither the policy nor application fixed a place for payment of the premium, nor named the person to whom it must be paid. The company had an office in New York City and a branch office in Chicago, and it was held that no forfeiture resulted from the failure of the plaintiff to pay the note when due at New York or Chicago, and that he was not obligated to seek

[29] Pendleton v. Knickerbocker L. Ins. Co., 5 Fed. Rep. 238. The charge of the court in this case was affirmed in s. c., 7 Fed. Rep. 173. The draft in this case was as follows: "325 Auburn, Ark., July 14, 1871. Three months after date, without grace, to the order of the Knickerbocker Life Insurance Company, three hundred and twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity. S. H. Pendleton, to Messrs. Greenwood & Co., New Orleans, La."

[30] Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696. See s. c., 115 U. S. 339. The court gave plaintiff (insured) verdict; upon appeal the decision was reversed; on rehearing, same opinion. In the case reported in 7 Fed. Rep. 173, the cases of Pitt v. Berkshire, 100 Mass. 500; Roehner v. Insurance Co., 63 N. Y. 160; Thompson v. Insurance Co., 2 Wood (U. S.), 547; Baker v. Insurance Co., 43 N. Y. 283; Roberts v. Insurance Co., 2 Disn. (Ohio) 106; s. c., 2 Big. 141; s. c., 1 Big. 634; and Howell v. Insurance Co., 44 N. Y. 276, are distinguished. See Seamans v. Insurance Co., 3 Fed. Rep. 325; Insurance Co. v. Young, 23 Wall. (U. S.) 85; Young v. Insurance Co., 2 Saw. (C. C.) 325.

[31] Griffith v. New York L. Ins. Co., 101 Cal. 627; 40 Am. St. Rep. 96; 36 Pac. Rep. 113.

the defendant out of the state.[32] In Iowa the assured does not waive the failure to give the required notice by applying for extension of time on a note,[33] and the notice is complete and the time begins to run when the letter containing the notice is mailed according to law.[34] A marine policy stipulating that it shall be void for failure to pay the premium note within a certain time after maturity and demand, is not rendered void ipso facto, but is voidable at the company's option, and the insurer may elect to continue the policy in force notwithstanding the default.[35]

§ 1207. Payment by Negotiable Paper—Cases Holding No Demand or Notice Necessary—Forfeiture.—In Roehmer v. Knickerbocker Life Insurance Company,[36] the policy was conditioned that the failure to pay any premium on the specified day when due, "failure to pay at maturity any note (other than the annual premium note) given for the premium, interest, or other obligation on this policy," should render the policy void, "without notice to any party or parties interested therein." The promissory note in question was given for a

[32] Blackerby v. Continental Ins. Co., 83 Ky. 574; 15 Ins. L. J. 756. Where a negotiable note was payable at a particular city, but at no specified place therein, and it provided for an additional rate of interest in case of nonpayment at maturity, and the note was not paid because of the inability of the maker, by the exercise of reasonable diligence, to ascertain where the note was kept, and he was ready to pay, it was held that he was relieved from the penalty: Ansel v. Olson, 39 Kan. 767; 18 Pac. Rep. 939.

[33] Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325. In Iowa the statute provides that when a promissory note is given and accepted by a fire insurance company for the premium, written notice must be given to the insured of its maturity, and that notice must be given of the intention to suspend the policy, and of the amount required to pay the customary short rates: McKenna v. State Ins. Co., 73 Iowa, 453; 35 N. W. Rep. 519; Laws Iowa, 1880, c. 210, sec. 2; McLain's Annot. Code Iowa, p. 299; Boyd v. Cedar Rapids Ins. Co., 70 Iowa, 325. See c. xxxiii, herein, as to notice of forfeiture and statutes requiring notice that premium is due and unpaid.

[34] Ross v. Hawkeye Ins. Co. (Iowa S. C. 1891), 50 N. W. Rep. 47.

[35] Louisville Underwriters v. Pence, 93 Ky. 96; 40 Am. St. Rep. 176.

[36] 63 N. Y. 160; 4 Daly (N. Y.), 512.

portion of the annual cash premium payable to the order of the company, and was conditioned that the policy should be void "in case this note is not paid at maturity according to contract in said policy." The note was not paid when due, but the following day the amount of the note was tendered and refused, and about four months thereafter the insured died. It was claimed that there could be no forfeiture of the policy, unless the intention so to do was, after failure to pay the premium, made known by the company to the holder of the policy; that is, the policy became only voidable at the option of the defendant, and not eo instanti, and that defendant was bound to demand payment of the note before forfeiture could be enforced. The question was thereby directly put at issue, but the court held that the policy lapsed per se upon failure to pay the note at maturity, and that the defendant was not required to make demand for payment of the note, and on refusal to pay to declare the policy void. That the note and policy should be construed together, and that it was plainly manifest that it was the intention of the parties that the omission to pay on the day stipulated should cause the policy to become void. That it was undoubtedly the intent that if the premium were not paid on the day specified in the policy, that the policy became void by force of the agreement made by the parties themselves, the condition being a condition precedent to the continuing life of the contract, for the insured was bound to a strict performance, unless the same was waived or the contract modified. It was also said that although the note was payable to order and negotiable, its very terms gave notice of the consideration and purpose of it, and of the conditions attached, and that it was dependent upon the terms of the policy, both being one continuing transaction.[37] So in another

[37] The court, per Folger, J., further says that: "But in this case it is plain that the policy provides for a lapse of it upon mere nonpayment of the annual premium, and for a like lapse upon the mere failure to pay at the maturity any note given like this for an accrued premium; and it is plain that the parties intended that these provisions of the policy should apply to and control that part of the transaction between them represented by the giving and taking of the note, and the extension thereby of the time for the payment of

case no place was designated in the note as that of payment, and it was held that the maker bound himself thereby to seek the payee and offer payment, and that no demand was necessary, and that mere nonpayment was default, although the court declared that the maker might have made the note payable at his residence.[38] And where the policy becomes void by such nonpayment, accepting the money after the loss does not make the insurers liable.[39] So in another New York case it is held that if the policy provide for a forfeiture on nonpayment of the premium, and the note is also conditioned that all claims under the policy shall become null and void if the note is not paid at maturity, and the note is renewed and the second note is not paid when due, the company may insist upon a forfeiture.[40] Again, the policy provided that "in case

the premium. It was just as much the case with the contract embodied in the note as the contract embodied in the policy, that one of its conditions was that a mere omission to pay at maturity did cause the policy to be void. The taking of such note as a means for providing for the premium was contemplated by the policy, and hence by the parties at the inception of their relation of insurer and insured, and therefore the payment of it at maturity was a consideration precedent to the continuance of the policy, for so are the terms of the policy in reference to it, and so are the terms of the note itself." It was further said that the defendants, on the day after maturity of the note, did "signify their election to avoid the policy because of nonpayment." What seems to us the principal point of the case, and one upon which it ought to turn, was the fact that no place of payment was named, and the note was in the possession of the defendants at their place of business, and was consequently payable there. The court, however, declares in this connection that it must "not be understood to admit that in such a case as this a demand would be necessary if a place of payment other than the office of the defendants had been named in the note." This case is distinguished in Pendleton v. Knickerbocker L. Ins. Co., 7 Fed. Rep. 173.

[38] McIntyre v. Michigan State Ins. Co., 52 Mich. 188; 13 Ins. L. J. 216; citing Thompson v. Insurance Co., 104 U. S. 252.

[39] Williams v. Insurance Co., 19 Mich. 451; Williams v. Republic Ins. Co., 19 Mich. 469. See American Ins. Co. v. Congle, 39 Mich. 536; American Ins. Co. v. Story, 41 Mich. 385; Yost v. American Ins. Co., 39 Mich. 531.

[40] Holly v. Metropolitan L. Ins. Co., 105 N. Y. 437. See How v. Union Mut. L. Ins. Co., 80 N. Y. 32; Attorney General v. North America Ins. Co., 80 N. Y. 152. See Baker v. Union L. Ins. Co., 43 N. Y.

any note or obligation given for the premium on this risk shall not be paid at maturity, such failure of payment shall terminate this insurance, and said note or obligation shall be considered the premium for the risk thus terminated," and it was held that default in payment of the note at maturity avoided the policy.[41] In a Massachusetts case[42] the note was given for a part of the premium. It was unpaid when the assured died. The condition in the policy was that it should be void for nonpayment of the premium when due, or if there should be a failure "to pay when due any notes or other obligations given for the premium," and the note was similarly conditioned, the insurers were held discharged.[43] In another case, however, which has been cited upon this point, the note was given to the agent payable to his order, and was accepted by him under an agreement that the note should be returned if the application was accepted. A policy was issued and sent to the agent, who never delivered it. The second premium became due and was not paid, and the court declared it unnecessary to determine the question as to the rights of the parties under the note, but held that no recovery could be had because of nonpayment of the second premium.[44] In New Jersey nonpayment of a note taken to extend the time of payment of the cash premium must be paid at maturity if so expressly stipulated, or the policy becomes void at once.[45] In a case in Iowa the policy provided that nonpayment of the note within sixty days after maturity and suit commenced for

(4 Hand) 283; reversing 6 Rob. (N. Y.) 393; 37 How. Pr. (N. Y.) 126; 6 Abb. Pr., N. S. (N. Y.), 144. This case is distinguished in Pendleton v. Knickerbocker L. Ins. Co., 7 Fed. Rep. 173. See Wall v. Home Ins. Co., 36 N. Y. 157.

[40] Muhlman v. National Ins. Co., 6 W. Va. 508. See Mason v. Citizens' Ins. Co., 10 W. Va. 527. See Southern L. Ins. Co. v. Taylor, 33 Gratt. (Va.) 743; 10 Ins. L. J. 208; Continental Ins. Co. v. Daly, 33 Kan. 601.

[42] Pitt v. Berkshire L. Ins. Co., 100 Mass. 500. See Shaw v. Benedict L. Ins. Co., 103 Mass. 254; Bigelow v. State etc. Ins. Co., 123 Mass. 113.

[43] This case is distinguished in Pendleton v. Knickerbocker L. Ins. Co., 7 Fed. Rep. 173.

[44] Security L. Ins. Co. v. Gober, 50 Ga. 504.

[45] Hudson v. Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

its collection should operate as a cancellation, and that collection of the note should not be a waiver, and it was held that in case of default in payment and collection of the note the company was not liable for a loss.[46] So under a decision in Connecticut it appeared that a note was given at three months for a half year's premium then due, and a receipt was given by the agent "for renewal of the policy," and it was held that the policy was not renewed beyond the time of the maturity of the note, and became void if the note was not then paid.[47] And in another case both the policy and notes given for the annual premium provided for such forfeiture, and also were conditioned that notice need not be given to any party or parties interested therein. It was held that payment at maturity was a condition precedent to the continuance of the risk; that the company was not compelled to elect whether or not the policy was forfeited in case of nonpayment of the notes at maturity, or to give notice, but that the policy became void by force of the default.[48]

§ **1208. Same Subject—The Rule.**—In cases of this character the condition is undoubtedly inserted for the benefit of the insurer, and it might be claimed in behalf of the policy-holder that such condition should, in conformity with the general rule, be construed most strongly against the insurer, and that courts do not favor forfeiture, and that the condition is a condition subsequent and not a condition precedent, and therefore a demand and declaration of forfeiture is neces-

[46] Shultz v. Hawkeye Ins. Co., 42 Iowa, 239; Nedrow v. Farmers' Ins. Co., 43 Iowa, 24; Williams v. Washington L. Ins. Co., 31 Iowa, 541. See section next preceding note 33 as to Iowa statute.

[47] Wilmot v. Charter Oak L. Ins. Co., 46 Conn. 483. See Lewis v. Phœnix Ins. Co., 44 Conn. 72; Bouton v. Insurance Co., 25 Conn. 542.

[48] Thompson v. Knickerbocker L. Ins. Co., 2 Wood (C. C.), 547; 104 U. S. 252. This case is distinguished in Pendleton v. Knickerbocker L. Ins. Co., 7 Fed. Rep. 173, and Insurance Co. v. Eggleston, 96 U. S. 572. Examine Catoir v. American L. etc. Ins. Co., 33 N. J. 487; New England Mut. L. Ins. Co. v. Hasbrouck, 32 Ind. 447; American Ins. Co. v. Klink, 65 Mo. 78; Insurance Co. v. Anderson, 80 Ill. 410; Ashbrook v. Phœnix Mut. L. Ins. Co., 94 Mo. 72; Patch v. Phœnix Ins. Co., 44 Vt. 481.

sary. But the parties are presumed to have deliberately determined the conditions under which they will be bound; and another general rule is, that contracts must be performed as they are made, when the conditions are valid and not against public policy. It is competent for the parties to stipulate in the contract that upon nonpayment of a promissory note or paper of like character at maturity the same shall be void; such a condition is valid and enforceable, and not against public policy nor unreasonable, and will control. Upon breach thereof the liability of the company will cease, according to the terms agreed upon. A like condition in the note will, coupled with the condition in the policy, evidence the intent of the parties at the time the note was given to be in conformity with the intent evidenced by the policy, and make the stipulations of the parties more definite, fixed, and certain.[49] Again, it is not necessary, as against the maker of a promissory note or acceptor of the bill of exchange, to either allege or prove a demand or notice, and a sufficient demand is made in case of payment at a particular place if the note is then and there ready to be paid. But the payee of a bill of exchange or check must properly make presentment and demand for acceptance upon the drawee within a reasonable time, unless the same be payable at a specified time, although delay in presenting a check is immaterial unless it injures the drawer.[50] Un-

[49] "The rule of law that all the writings executed by the parties at the time form a part of the contract is recognized. The policy and the notes must be taken as one contract, and construed accordingly": New England Mut. L. Ins. Co. v. Hasbrouck, 32 Ind. 447, per the court.

[50] See as to the above general principles governing commercial paper: Dockray v. Dunn, 37 Me. 442; Walsh v. Dart, 23 Wis. 334; 99 Am. Dec. 117; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; 8 Am. Dec. 396; Hills v. Place, 48 N. Y. 525; 8 Am. Rep. 568; Peirce v. Smithers, 27 Pa. St. 249; Kinyon v. Stanton, 44 Wis. 479; 28 Am. Rep. 601; Pitt v. Berkshire Ins. Co., 100 Mass. 500; Batchellor v. Priest, 12 Pick. (Mass.) 399; Reeve v. Peck, 6 Mich. 240; Merchants' Bank v. Elderkin, 25 N. Y. (11 Smith) 178; Kelley v. Second Nat. Bank, 52 Barb. (N. Y.) 328; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Anderson v. Drake, 14 Johns. (N. Y.) 114; 7 Am. Dec. 442; Smith v. Miller, 43 N. Y. 171; 3 Am. Rep. 690; Knott v. Venable, 42 Ala. 186; Compton v. Gilman, 19 W. Va. 312; 42 Am. Rep. 776; Bank of Rem-

less, therefore, there is something in the particular circumstance of a case to warrant a departure therefrom, or unless a statute provide otherwise,[51] the rule evidenced by the undoubted weight of authority is, that the contract ceases in such case upon default according to and in the manner provided by the stipulations, and that no demand or notice or declaration of forfeiture is necessary; that the company may lawfully avail itself of such stipulations as to forfeiture, and their act in so doing is not against public policy. But the provision for avoidance must in such case be clear and distinct. The company may, however, waive such forfeiture, or may revive the policy, or an estoppel be raised against it by the circumstances. To avoid, however, a policy of insurance conditioned on the payment of a premium note, the burden of proving nonpayment is on the insurer.[52]

§ 1209. When Stipulation is that Policy Void or Risk Suspended for Nonpayment of Note.—Insurance contracts of a similar character are governed by a like rule so far as applicable. Thus, it is frequently stipulated that if a note given for the premium is not paid at its maturity, the policy shall cease and remain void while the note is unpaid, or that the risk shall be suspended, and the company shall not be liable for a loss occurring during such period. The policy may also provide that if payment be thereafter made, it shall be revived and continued in force from the time of payment. In such case, if the note is overdue, payment must be made before loss to warrant a recovery. A tender after loss of amount due

ington v. Raymond, 12 Vt. 401; Syracuse etc. R. R. Co. v. Collins, 57 N. Y. 641; 3 Lans. (N. Y.) 29; Wolff v. Murray, 2 Sand. (N. Y.) 166; Foden v. Sharp, 4 Johns. (N. Y.) 183; Walker v. Stetson, 19 Ohio St. 400; 2 Am. Rep. 405. See notes on place of presentment, what is sufficient, 15 Am. Dec. 643, 644; 24 Am. Rep. 160, 161. As to removal of maker out of state, see note 13 Am. Dec. 346, 347. If a draft is accepted without specifying any place of payment, it is held sufficient to present it for payment at the place of its date: Wittkowski v. Smith, 84 N. C. 671; 37 Am. Rep. 632.

[51] See c. xxxiii, as to nonforfeiture statutes and statutes requiring notice that premium is due and unpaid.

[52] Hodsdon v. Guardian etc. Ins. Co., 97 Mass. 144.

is not sufficient.[53] If the policy and premium note both stipulate for forfeiture, the first for failure to pay moneys required to be paid, and the latter for failure to pay on maturity thereof, nonpayment on time operates as an absolute forfeiture.[54] If the policy and a note given for the premium both provide for forfeiture in case of nonpayment of the note at maturity, nonpayment avoids the policy.[55] So in Nebraska, if a fire policy stipulates that a failure to pay the premium note when due will suspend the risk until payment, but that it may be revived for the full balance of the term by making full payment at any time before loss the insurer is not liable for a loss occurring after maturity of the note, and after it has been partly but not fully paid.[56] In an Iowa case the policy contained a like condition, and one of the notes was not paid when due and was unpaid when the loss occurred. The note in question matured February 1st. The company sent a notice February 11th that the note was due, and that unless paid within a specified time thereafter the policy would be canceled. Such notice was held sufficient to warrant a suspension of the policy.[57] And in Illinois a stipulation in both the policy and note will be enforced requiring the payment at maturity of a note given for a premium on a life risk, or that otherwise the policy will be forfeited.[58] In Michigan if a note is overdue and unpaid at the time of the loss, and the condition is that the company shall not be liable while any note for the premium is past due and unpaid, no recovery can be had.[59] But on subsequent payment of the note the policy

[53] Continental Ins. Co. v. Dorman, 125 Ind. 189; 25 N. E. Rep. 213.

[54] Laughlin v. Fidelity Mut. L. Ins. Co. (Tex. Civ. App. 1894), 28 S. W. Rep. 411.

[55] Frank v. Sun L. Ins. Co. (Can. S. C. 1894), 14 Can. L. T. 359.

[56] Phœnix Ins. Co. v. Bachelder, 32 Neb. 490; 29 Am. St. Rep. 443.

[57] Morrow v. Des Moines Ins. Co., 84 Iowa, 256; 51 N. W. Rep. 3, under Laws Mich. 1880, c. 210, requiring that notice be given.

[58] Pulling v. Travelers' Ins. Co., 159 Ill. 262; 55 Ill. App. 452; 26 Chi. Leg. News, 222.

[59] In this case the money for the premium was paid immediately after the loss, but was returned by the company: Robinson v. Continental Ins. Co., 76 Mich. 641; 43 N. W. Rep. 648. See Williams v. Albany City Ins. Co., 19 Mich. 451; 2 Am. Rep. 95; Girton v. Dodge Co. Mut. Ins. Co., 39 Wis. 121; Wall v. Home Ins. Co., 36 N. Y. 157.

revives, and continues in force from the date of such payment;[60] although an agreement by the company's agent that the note may lie over for a few days is an agreement not to press payment and does not revive or continue the policy.[61]

§ **1210. Note for Entire Premium—Suspension Risk.** In Nebraska, a note payable in one year from its date was given for an entire premium on a five-year fire risk. The contract therefor, both note and policy, stipulated for suspension of the risk during default in payment, and for revival thereof by a subsequent payment. The note was not paid, and in an action upon the note a recovery for the full amount was adjudged, on the ground that the plaintiff had a right to waive the forfeiture, and the contention of the defendant that the recovery should be limited to such an amount as equaled the customary short rate for one year's risk was not sustained.[62]

§ **1211. When Condition for Forfeiture is in Note Only.**—When the condition as to forfeiture for nonpayment on maturity of a note given for the premium is contained only in the note, the mere fact that the note is not paid at maturity does not of itself avoid the policy. Such a provision is a condition subsequent, of which the company must avail itself by clear and unequivocal acts. It must demand payment at the proper time, and, if no payment is made, it must declare the policy forfeited or void. Thus, a note given

[60] Williams v. Albany City Ins. Co., 19 Mich. 451; 2 Am. Rep. 95.

[61] Wall v. Home Ins. Co., 36 N. Y. 157; 8 Bosw. (N. Y.) 597. See Harley v. Council Bluffs Insurance Co., 71 Iowa, 401; 32 N. W. Rep. 396; Carlick v. Mississippi etc. Co., 44 Iowa, 553. Under a Texas civil appeals decision the risk is not terminated by a default in the payment of a premium note, but only suspended, there being no waiver or estoppel against the company, where it is stipulated that the policy shall cease upon such nonpayment and that the company shall not be liable during such default, and this is so even though there is a condition that after the default the company is not liable until there is a revival of the risk under a written consent: East Texas F. Ins. Co. v. Perkey, 5 Tex. Civ. App. 698; 24 S. W. Rep. 1080.

[62] Phenix Ins. Co. v. Rollins, 44 Neb. 745; 63 N. W. Rep. 46.

for the balance due on a premium, part of which had been paid in cash, provided that "if the amount of this note shall not be paid when due, the said policy shall be null and void," which note was overdue and unpaid when the insured died. The company neither demanded payment when due nor gave notice of its intention to insist upon a forfeiture, and it was held that the policy continued in force until the maturity of the note, and was not forfeited by failure to then pay the same.[63]. In another case a policy of life insurance contained the usual clause of forfeiture for nonpayment of premiums. Departing from the strict rules of the company, a duly authorized agent had allowed the cash part of the premium to be paid one-half cash, the other half by a short note. Upon the day the premium was due, the agent received the check of the assured for the half cash due and six months' note, giving the renewal receipt for a year. The note contained the clause, "If not paid at maturity said policy is to be null and void." Neither check nor note was paid, and it was held that the mere fact that the note was not paid at maturity did not of itself avoid the policy, but only gave the insurance company the option of declaring a forfeiture. That this option must be asserted by clear and unequivocal acts, it was also declared that the clause of forfeiture being inserted in the note for the benefit of the company could be waived by failure to act, or by other circumstances evincing an intention not to claim the benefit of the stipulation, and whether the company had exercised such option or waived their rights was a question of fact for the jury under all the circumstances of the case. It was further decided that the insured was entitled to a renewal upon tendering at the proper time the proper amount of premium due; that this amount did not include interest on premium notes previously given where the policy did not provide for its forfeiture by reason of nonpayment of such interest.[64] Again, it is held that such a condition in the note is nugatory, and the continuance of liability on the policy is not dependent on the payment of the note at maturity where the policy

[63] Montgomery v. Phœnix Mut. L. Ins. Co., 14 Bush (Ky.), 51.

[64] Mutual L. Ins. Co. v. French, 30 Ohio St. 240; 2 Cin. Sup. Ct. 321; 27 Am. Rep. 443.

does not stipulate for forfeiture for such nonpayment.[65] In a New York case the note provided that the policy should lapse for nonpayment at maturity. Payment was not then made, and a notice by letter from the company's secretary was given that the policy was forfeited and canceled on the books; that if it was desired to revive the same, notice should be given the company thereof at once. This was not done, nor was the note ever paid, and whether the letter was properly mailed or whether there was a waiver was held a question for the jury.[66]

§ 1212. When There is No Condition as to Forfeiture for Nonpayment of Note.—In the absence of a stipulation in the contract for forfeiture or suspension of the risk, or similar condition in case of nonpayment of a note given for the cash premium when due, payment is not a condition precedent to the validity of the policy, and it continues in force notwithstanding the note is not paid at maturity,[67] even though the policy provides that if the premium be not paid when due, the insurance policy shall become forfeited and void.[68] And in the absence of such a stipulation as we are

[65] Dwelling-House Ins. Co. v. Hardie, 37 Kan. 674; 16 Pac. Rep. 92. See further on this point, Insurance Co. v. Hardie, 37 Kan. 673.

[66] It did not sufficiently appear from the evidence, however, that the letter was mailed as a matter of law, and a refusal to submit the question to the jury was declared error. Another question, however, arose in this case, and that was the power of the secretary to waive prompt payment of premiums, and the fact whether there was a waiver was held to be a matter for the jury: Hastings v. Brooklyn L. Ins. Co., 138 N. Y. 473; 53 N. Y. St. Rep. 63; 44 N. Y. St. Rep. 37; 17 N. Y. Supp. 333.

[67] Franklin L. Ins. Co. v. Wallace, 93 Ind. 7; McAllister v. New England Mut. L. Ins. Co., 101 Mass. 558; Trade Ins. Co. v. Barracliff 45 N. J. 543; Michigan Mut. L. Ins. Co. v. Bones, 42 Mich. 19; Shaw v. Republic L. Ins. Co., 69 N. Y. 286; Southern L. Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606. And this conforms to the rule stated by Emerigon (Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 7, p. 70), who says that if credit is given for the premium, there being no stipulation for forfeiture, default in payment at the time agreed does not operate as a rescission of the contract, unless there be a custom at the place of contract to the contrary.

[68] New England L. Ins. Co. v. Hasbrouck, 32 Ind. 447; McAllister v. New England Mut. L. Ins. Co., 101 Mass. 558. In this last case it was stipulated that "the policy and any sums that shall become

considering, if the note is extended and before maturity death occurs, the policy is not avoided.[69] But in a Kentucky case it is held that where, as a favor to the insured, credit is extended to him for some portion of a cash premium, the failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy is thereby forfeited.[70]

§ **1213. Subsequent Parol Agreement—Nonpayment of Note—Forfeiture.**—A policy is not rendered void by the mere fact that the note taken for the cash premium is not paid at maturity, under a parol agreement that in such case the policy should be surrendered, where such agreement is not referred to in either the policy or note, and is made after the delivery of the policy to the beneficiaries, and without their consent, the insurance being taken out on the life of a father in favor of his children. If the notes are retained by the insurers, and the policy is not surrendered to them, and no action is taken to dissolve the contract, it continues valid.[71]

§ **1214. Power of Mutual Company to Take Note.**—A mutual company has power to take notes for a portion of the premium;[72] but in general their powers, as to premium, deposit, capital, advance, or security notes, must depend largely upon the charter provisions, as well as such statutes as affect the right. Thus, under a statute which provides that in no case

due thereon from said company are pledged and hypothecated to said company, and they have a lien thereon to secure payment of any premium on which credit may be given, and of any note or security therefor." And a recovery was permitted in a case where notes were given for a part of the premium, and the contract did not provide for forfeiture, although when the first installment note became due the insured, upon demand for payment thereof by the insurer's agent, had refused payment and declared that he had abandoned the insurance, and would have nothing more to do with the company; it also appearing that the company had not assented thereto and held the notes, and that the policy was not surrendered.

[69] Kansas Prot. Union v. White, 36 Kan. 760.

[70] St. Louis Mut. L. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310.

[71] Trager v. Louisiana Eq. L. Ins. Co., 31 La. Ann. 235.

[72] See citations generally under sec. 341 and c. xvi, herein.

shall the premium note be more than twice the amount of the cash premium, it is held that a by-law may validly provide for a cash premium the first year, and the giving of four notes payable annually thereafter for the premium on a five-year plicy.[73] So the Indiana statute of 1881 concerning mutual fire insurance companies provides, as a condition precedent to receiving a policy, for the deposit of a note subject to assessment as the directors may require, or for the payment of a definite consideration in lieu of such note. It also provides as to the manner of appropriation of the funds, and such notes are only assessable to provide indemnity against losses by fire, and the fund created thereby must be first exhausted for the purpose before resort can be had to the cash funds.[74]

§ **1215. Validity of Notes for Premium and Premium Notes.**—Premium notes given for insurance are not valid if the policy for which they are given is void; such notes are without consideration, and no action thereon can be sustained therefor.[75] So if the notes are given for a policy which cannot be enforced in the state where made, they are not enforceable as between the original parties in another state.[76] So where payments on installment notes fall due in advance, no recovery can be had on such notes by a foreign company whose authority to do business within the state has been revoked,[77] and the consideration of notes given for the last four annual premiums under a five years' insurance has failed, and they cannot be collected if the company has during the first

[73] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771, under Wis. Rev. Stats., sec. 1907.

[74] Clark v. Manufacturers' Mut. F. Ins. Co., 130 Ind. 332; 30 N. E. Rep. 212, under Rev. Stats. Ind. 1881, sec. 3752.

[75] York County Mut. F. Ins. Co. v. Turner, 53 Me. 225; Gray v. Sims, 3 Wash. (C. C.) 276; Ingrams v. Mutual Assur. Soc., 1 Rob. (Va.) 661; Frost v. Saratoga Ins. Co., 5 Denio (N. Y.), 154; 49 Am. Dec. 234; Wadsworth v. Davis, 13 Ohio St. 123; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Haverhill Ins. Co. v. Prescott, 42 N. H. 547; Miner v. Judson, 2 Lans. (N. Y.) 300.

[76] Ford v. Buckeye State Ins. Co., 6 Bush (Ky.), 133; 99 Am. Dec. 663.

[77] So held in American Ins. Co. v. Story, 41 Mich. 383.

year become insolvent and ceased to conduct its business.[78] But although the company is insolvent, if such fact is unknown by its officers or agents at the time it issues the policy there is nevertheless a valid consideration for a note given for the premium.[79] But notes are valid for their face in the hands of a receiver, even though the makers took out no policies, and they are given in advance for premiums on policies to be taken out, if they are given to encourage others to transact business with the company and for the protection of persons to be insured,[80] and if the insurance is an illegal one, the note given for the premium is void.[81] So a note given as a consideration for the premium on a policy issued over a month before the company was authorized to commence business is void,[82] and a note signed by one of the members with the firm name for an insurance on his individual property is void.[83] But a security note is valid for its face, though payable to the order of the maker, though not indorsed by him;[84] and if the policy has attached and is valid, it is held that the note is valid, and a note given for premiums in advance as security for dealers with the company is valid.[85] But if the vessel was unseaworthy when the risk commenced, the note for the premium cannot be enforced,[86] and it is held that an alienation of the property which avoids the policy also avoids the note.[87] So, also, is a note given under a policy which is void because the insured has no title to the real estate.[88] But the fact that the insurer was entitled to cancel the policy upon notice at any

[78] Home etc. Ins. Co. v. Dauberspeck, 115 Ind. 306; 17 N. E. Rep. 601.

[79] So held in Lester v. Webb, 5 Allen (Mass.), 569.

[80] Brown v. Crooke, 4 N. Y. 51.

[81] Russell v. De Grand, 15 Mass. 35. See Chesborough v. Wright, 41 Barb. (N. Y.) 28.

[82] Williams v. Babcock, 25 Barb. (N. Y.) 109.

[83] Lime Rock F. & M. Ins. Co. v. Treat, 58 Me. 415.

[84] Browner v. Hill, 1 Sand. (N. Y.) 629.

[84a] Atlantic Ins. Co. v. Goodall, 25 N. H. 369.

[85] Cruikshank v. Brouwer, 11 Barb. (N. Y.) 228.

[86] Commonwealth Ins. Co. v. Whitney, 1 Met. (Mass.) 21.

[87] Miner v. Judson, 5 N. Y. Sup. Ct. 46; 2 Hun (N. Y.), 441; 2 Lans. (N. Y.) 300. See Hazard v. Franklin F. Ins. Co., 7 R. I. 429.

[88] Busch v. Sinissippi Ins. Co., 28 Ind. 64.

time does not make the consideration for the note void,[89] and the fact that the directors insured property in one class, which should under the charter and by-laws have been insured in another class, does not invalidate the policy, and the note is good.[90] If the contract was not completed, or if the policy has never been accepted, the note is not valid.[91]

§ **1216. Premium Note given Unauthorized Company.** In Massachusetts, a premium note given to a foreign company for insurance effected in the state is void if such company has not complied with the statutory requirements whereby alone it may do business.[92]

§ **1217. Premium, etc., Notes—Generally.**—We have in a prior chapter[93] stated what constitutes the capital stock of a mutual company. The premium in such companies is usually paid partly in cash and partly in premium notes. If a note is given payable at such times as the directors may require according to the charter and by-laws, it will be presumed to be a premium or deposit note, and no recovery can be had thereon, unless it is duly assessed.[94] Sometimes, in addition to cash premiums, notes are given annually subject to be canceled by dividends with interest payable thereon annually until so canceled, and the balance due, if any, to be deducted out of the amount payable, unless the note is sooner taken up, as is sometimes provided;[95] and a note may be given in advance for premiums to be earned and only collectible to that extent, in which case it is only a premium note, and not a

[89] Irwin v. National Ins. Co., 2 Disn. (Ohio) 68; 1 Disn. (Ohio) 430.

[90] U. M. F. Ins. Co. v. Keysor, 32 N. H. 313.

[91] Real Estate Ins. Co. v. Roessle, 1 Gray (Mass.), 336.

[92] Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413; 36 N. E. Rep. 59, under Stats. Mass. 1887, c. 214, sec. 77. But see Connecticut etc. Ins. Co. v. Way, 62 N. H. 622. See secs. 1267, 1275, herein.

[93] Chapter xv.

[94] Hope Ins. Co. v. Weed, 28 Conn. 51; Sands v. St. Johns, 36 Barb. (N. Y.) 628; Savage v. Medbury, 19 N. Y. (5 Smith) 32.

[95] Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988; Olide v. Northwestern etc. Ins. Co., 40 Iowa, 357; Northwestern Mut. L. Ins. Co. v. Bonner, 36 Ohio St. 51.

capital stock note;[96] or the company may be empowered to receive notes for advanced premiums to be written against at a compensation not to exceed a certain per cent to be allowed.[97] So a note may be given as a deposit to constitute the absolute funds of the company and not liable to assessment, but payable on demand by the company;[98] or a deposit note may be received, in pursuance of the act of incorporation and of the by-laws, in payment of assessments therefor to be made, and also in payment of a certain amount fixed by a per cent upon the property insured and required to be paid into the treasury before the policy is issued;[99] or a note may be made conditional only upon the necessities of the company and demand of its officers.[100] Again, a note may in form be a premium note, but it may be alleged and proved that it was given, accepted, and used as a capital note on the organization of the company, in which case it may be recovered in full without an assessment.[101] In case premium notes in advance are received as additional security to the dealers, and are to be liable for losses after the cash capital and other resources are exhausted, the word "exhausted" goes to the sufficiency of the other assets, and does not require the actual collection or sale and application of said other assets before resorting to such notes. The obligation of the makers is to the creditors in such case, and not as sureties to the company, and although a change in doing business by the company may decrease the cash assets, the makers of the notes are not thereby discharged by such wrongful acts.[102] It may be a question for the jury whether a note is a security note or one given in advance for premiums.[103] If notes are given and accepted under the com-

[96] Elwell v. Crocker, 4 Bosw. (N. Y.) 22.

[97] Chesborough v. Wright, 41 Barb. (N. Y.) 2c.

[98] Shawmut etc. Ins. Co. v. Stevens, 9 Allen (Mass.), 332.

[99] Rix v. Mutual Ins. Co., 20 N. H. 198.

[100] Howland v. Cuykendall, 40 Barb. (N. Y.) 320.

[101] Sands v. St. Johns, 36 Barb. (N. Y.) 628.

[102] Osgood v. Toole, 60 N. Y. 475.

[103] Merchants' Mut. Ins. Co. v. Rey, 1 Sand. (N. Y.) 184. A note given for the premium is not a deposit note under the Maine statute: Union Ins. Co. v. Greenleaf, 64 Me. 123, under Me. Rev. Stats., c. 49, sec. 26.

pany's charter in advance as security to its dealers, with interest to be paid thereon, they are the absolute property of the company, whether taken prior or subsequently to its organization.[104] But a note absolute upon its face may be shown to be a security for losses upon assessments to be made for that purpose,[105] and a person who has notice of its real character cannot treat such a note as an absolute one.[106]

§ 1218. Negotiability of Notes for the Premium and Premium, etc., Notes.—A note given for premium on an open marine policy is negotiable, and may be transferred like other notes. There is no implied agreement that it shall be retained by the insurers until due, so as then to be subject to the adjustment of losses.[107] So notes given for cash premiums generally may be negotiated if so made as to be transferred, and parties may become bona fide holders thereof,[108] and such holder for value who received the note before it became due may recover upon the same, although given for an advanced premium to be written against, although it is illegal as between the parties, where he has no notice of the facts constituting such illegality, and the statute does not make the note void.[109] If it is evident from the provisions of the charter or

[104] Brown v. Crooke, 4 Comst. (N. Y.) 51.

[105] Mutual B. L. Ins. Co. v. Jarvis, 22 Conn. 148.

[106] Ball v. Shibley, 33 Barb. (N. Y.) 610.

[107] Furniss v. Gilchrist, 1 Sand. (N. Y.) 53.

[108] Farmers' Bank of Saratoga v. Maxwell, 32 N. Y. 579. The note in this case was payable absolutely at a fixed time and place.

[109] Chesborough v. Wright, 41 Barb. (N. Y.) 28. It is held in Michigan, although not in an insurance case, that a note may be valid in the hands of a holder for value, although it may be void at the common law, because of illegality in its consideration where it is not in contravention of any statute, and is reserved without knowledge of the agreement on which it is based in the ordinary course of business before maturity: Davis v. Seeley, 71 Mich. 209; 38 N. W. Rep. 901 (one judge dissenting); annotated case, Ball v. Shibley, 33 Barb. (N. Y.) 610. The sale of a note given the company's agent for the premium to a bona fide purchaser for value renders the insurer liable therefor to the insured, where the latter has been compelled through a suit to satisfy the claim of such holder, said note having been given under an agreement to return the same, should a policy not be issued: New York L. Ins. Co. v. Baese (Tex. C. C. A. 1895), 31 S. Rep. 824.

act of incorporation of a mutual company, or from the terms of the contract with its members, or from the note itself, the company having authority to so contract, or to receive such note, that stock or advance notes given to aid in forming a mutual company, and constituting a part of the capital stock, are to be payable absolutely without being dependent upon losses and expenses, and that they may be indorsed and transferred by the corporation, they will be held absolutely payable and negotiable, and they are also subject to the statute of limitations. In all such cases the purposes and objects which it is intended to effect will be considered, having in view the statute of incorporation or charter, and the powers which the legislature has given to the corporation.[110] And parties receiving such notes as bona fide holders, or as collateral se-

[110] White v. Haight, 16 N. Y. 310. The note in this case was payable as follows: "I promise to pay the said company or their treasurer, for the time being, the sum of five hundred dollars in such portions, and at such time or times, as the directors of said company may agreeably to their act of incorporation require." Denio, C. J., says in this case: "I am of opinion that the note was absolute and payable at all events. . . . . They are to be given for premiums in advance upon risks contracted to be taken. They are to be considered as capital. . . . . They are to be negotiable and may therefore be indorsed and transferred by the corporation at its pleasure": Id. 321; Brookman v. Metcalf, 32 N. Y. 591. The note in this case was given for premiums in advance, and the charter provided that such notes might be negotiated: Sands v. Campbell, 31 N. Y. 345. In this case an injunction was had restraining the receiver of the company from collecting and receiving any moneys on the premium notes of said company, and it was declared that the statute of limitations on such notes began to run from the time it was given, citing Howland v. Edmonds, 24 N. Y. 307; but that the time during which the injunction was operative should be deducted: Lawrence v. McCready, 6 Bosw. (N. Y.) 329. The syllabus in this case reads: "1. In the absence of any statute or provision in the charter authorizing an insurance company to receive notes in advance of premiums to be earned by the company, by insuring the maker, or defining the rights and liabilities of the parties when such note is given, the mere fact that the makers united with several others in giving such notes to an insurance company upon an understanding that the notes should be renewed from time to time for such amounts as should not be earned, and that the makers should be allowed five per cent on the amount of premiums earned as a compensation for the advance, do not make the makers liable to the company, so that upon its insolvency and discontinuance of its business the receiver

curity, are entitled to be protected.[111] Consideration should be given in all cases by the transferee or indorsee to such notice as the terms of the note impart, as to the conditions upon which it is payable, as well as to the character of the note, and this statement applies equally to notes given for cash premiums as to others.[112] Notes which are based upon a contingency for their payment, such as the ordinary premium or deposit notes, are not, however, negotiable, nor subject to the statute of limitations.[113]

§ **1219. When Note is Payable.**—A note payable in such portions and at such times as the directors may require is in effect payable on demand, or when the directors have properly required the payment thereof,[114] although the statute under which the company is incorporated requires capital notes to be payable at "the end of or within," twelve months from their date.[115] But it must appear that payment was required by the directors, and that losses and expenses had been incurred to warrant a recovery.[116] So a deposit note constituting the absolute funds of the company and payable on demand may be enforced after such demand, nor is any assess-

can collect thereon any greater sum than the company has earned; 2. It seems that such a note would be good and collectible in the hands of an indorsee for value": Howland v. Meyer, 3 Comst. (3 N. Y.) 290. The note here read: "Twelve months after date, I promise to pay the Alliance Mutual Insurance Company or order," etc. The act under which the company was incorporated provided that the company might receive notes for premiums in advance for the better security of its dealers, and might "negotiate the same for the purpose of paying claims or otherwise in the course of its business," and it was held that such a note might be transferred to a party who had insured in the company on account of a claim for loss.

[111] Brookman v. Metcalf, 32 N. Y. 591.

[112] As to conditions in the latter, see sec. 1211, herein.

[113] Savage v. Medbury, 19 N. Y. (5 Smith) 32; Howland v. Cuykendall, 40 Barb. (N. Y.) 320; Howland v. Edmonds, 24 N. Y. 307; Hope Ins. Co. v. Weed, 28 Conn. 51.

[114] Hill v. Reed, 16 Barb. (N. Y.) 280; Gaytes v. Hibbard, 5 Biss. (C. C.) 99; Nashua F. Ins. Co. v. Moore, 55 N. H. 48.

[115] Hill v. Reed, 16 Barb. (N. Y.) 280.

[116] American Ins. Co. v. Schmidt, 19 Iowa, 502; Warner v. Burn, 36 Iowa, 385.

ment or attempt to collect similar notes necessary;[117] and a premium note may become due and payable not only at maturity, but also at the time of a loss in case it occurs prior thereto.[118] So the contract may provide that the neglect to pay an assessment when due shall render the whole of the note due and payable,[119] or the contract may be such that the company has the right, should its necessities so require, to demand the payment in whole or in part of a note executed for the unpaid portion of annual premiums.[120]

§ **1220. Validity of Provisions as to Premium, etc., Notes.**—A mutual insurance company organized under the laws of Indiana may validly provide that upon default after notice in paying installments on a premium note ordered by the directors, the whole amount of the note shall be due and collectible.[121] So in Dakota it is held that the policy may provide for liability on notes given for quarterly premiums, although the liability of the insurer has determined, and that such provision is not prohibited by the statute nor against public policy, nor unreasonable.[122] And a marginal provision as to the payment of the premium partly in notes is part of the contract;[123] and a provision as to forfeiture for nonpayment of interest on premium notes when due is valid.[124]

§ **1221. Lien on Premium Notes and Funds.**[125]—A mutual insurance company may by its charter have a lien not only on the premium note, but also upon funds due for a loss to the extent of the amount of said note, and to meet the liability of

[117] Shawmut etc. Ins. Co. v. Stevens, 9 Allen (Mass.), 332.

[118] Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354.

[119] Jones v. Sisson, 6 Gray (Mass.), 288.

[120] St. Louis Mut. L. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310.

[121] German etc. Ins. Co. v. French, 22 Ind. 364.

[122] St. Paul F. & M. Ins. Co. v. Coleman, 6 Dak. 458; 43 N. W. Rep. 693.

[123] Pierce v. Charter Oak Ins. Co., 138 Mass. 151.

[124] Nettleton v. St. Louis L. Ins. Co., 7 Biss. (C. C.) 293; Attorney General v. North American L. Ins. Co., 82 N. Y. 172. See, also, Knickerbocker L. Ins. Co. v. Dietz, 52 Md. 16. But see Northwestern Mut. L. Ins. Co. v. Fort, 82 Ky. 269.

[125] See sec. 1131, herein, as to lien for premium notes.

the insured on assessments which may be levied on said premium notes, and the company does not lose its lien by paying the money into court to await an adjustment of liabilities after a judgment against it for the loss.[126] And by the terms of the contract the premium notes may be secured by a lien on the policy under an authority to loan part of the premiums thereon to the holder.[127]

§ 1222. Liability on Premium, etc., Notes—Generally. Owing to the various forms of insurance contracts where premium and other notes are given, it is impossible to formulate other than the most general rules in relation thereto, although one or more of the following factors are important in determining the question. They are: 1. The power of a mutual company to take such notes;[128] 2. The validity of the note;[129] 3. Its character and form, which includes its negotiability and terms of payment;[130] 4. The validity of contract provisions relating thereto;[131] 5. The construction of the terms of the contract, including the charter and by-laws, and such statutes as may apply, and in this connection whether the powers of the company have been lawfully exercised in relation to such notes from their inception until the final determination of liability thereon;[132] 6. If the note is negotiable, the rights of bona fide holders thereof;[133] 7. The effect upon the note of withdrawal of the member; of surrender of the policy; of the loss or insolvency of either party, and of breach of conditions generally by the parties.

§ 1223. When Liability Absolute on Note—When not. The distinction, however, between the liabilities of those who

[126] Susquehanna Mut. F. Ins. Co.'s Appeal, 105 Pa. St. 615.

[127] Such was the contract in Northwestern Mut. L. Ins. Co. v. Bonner, 36 Ohio St. 51.

[128] See sec. 1214, herein.

[129] See sec. 1215, herein.

[130] See secs. 1217-1219, herein.

[131] See sec. 1220, herein.

[132] See chapters herein on construction; also cases throughout this chapter.

[133] See sec. 1215, herein.

give notes to form the capital stock and those whose notes are not given until after the stock is made up and the company organized should be remembered, since the former class are liable on their notes, irrespective of losses, while the latter are liable only for their pro rata share of the losses and expenses in common with others who have given like premium notes, which are available.[134] When a firm gives the premium note in advance for the security of dealers under the charter of a mutual insurance company, and a new firm is formed, which succeeds to its business, and which gives a note in renewal of the one first given, the signers of such note are liable therefor. And where premiums have been earned against it by the company while the note is running, the firm is not liable for such premiums in addition to such note.[135] So a note which constitutes part of the capital stock of a company is, under the New York statute of 1849, payable absolutely when payable in such proportions and at such times as the directors of the company, agreeably to their charter and by-laws, may require.[136] And a note may be collected in full without assessment where it is in fact a stock note given and used as such, although it be in form a premium note.[137]

§ **1224. Liability for Losses Prior to Membership.**— The terms of the contract must determine the liability of a member on his premium note, and he is entitled to insist that such liability shall not be extended beyond his contract, and in case a premium note is given payable as the directors may require, he is not liable in such case for losses occurring before he became a member;[138] and in case of deposit notes sub-

[134] Dana v. Munro, 38 Barb. (N. Y.) 528, per Mullin, J.

[135] Maine Mut. M. Ins. Co. v. Blunt, 64 Me. 95.

[136] Hart v. Achilles, 28 Barb. (N. Y.) 576; White v. Haight, 16 N. Y. 310; citing Furness v. Gilchrist, 1 Sand. (N. Y.) 53; Brouwer v. Hill, 1 Sand. (N. Y.) 629; Browner v. Appleby, 1 Sand. 158; Hone v. Allen, 1 Sand. (N. Y.) 171; Hone v. Folger, 1 Sand. (N. Y.) 177; Deraismes v. Merchants' Mut. Ins. Co., 1 Comst. (N. Y. 371; Howland v. Meyer, 3 Comst. (N. Y.) 290; Brown v. Crooke, 4 Comst. (N. Y.) 51; Emmet v. Reed, 8 N. Y. (4 Seld.) 312.

[137] Sands v. John, 36 Barb. (N. Y.) 628.

[138] Koehler v. Beeber, 122 Pa. St. 291. See Long Pond Mut. Ins. Co. v. Houghton, 6 Gray (Mass.), 77.

ject to a pro rata assessment on all the notes to be determined by the directory, the responsibility to contribute to a loss begins when the risk has attached, and terminates when the policy expires.[139] But the terms of the contract may be such that a note may be collected to pay losses and expenses which accrued before the maker became a member of the corporation. This was so held where a deposit note was given to be considered the absolute funds of the company, and assessed and collected as the directors should deem expedient, and, in case losses should occur so as to consume the absolute funds of the company, then the members should pay an additional sum not exceeding a certain proportionate amount.[140]

§ 1225. When Liability Continues until Policy Surrendered and all Assessments Paid.—Where the contract so provides, the maker of a premium or deposit note may be liable to assessment thereon until the policy is actually surrendered and payments made of all assessments for losses sustained prior to such surrender, even though incurred subsequently thereto, and notwithstanding the policy has become forfeited by alienation of the property.[141] So it is also held

[139] Planters' Ins. Co. v. Comfort, 50 Miss. 662.

[140] Nashua F. Ins. Co. v. Moore, 55 N. H. 48. See Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray (Mass.), 77; Susquehanna Mut. F. Ins. Co. v. Stauffer, 125 Pa. St. 416; 17 Atl. Rep. 471.

[141] In Atlantic Ins. Co. v. Goodall, 35 N. H. 328, in which the question was considered, the court said: "It is assumed by the plaintiff that the note and policy were dependent on each other, and that the policy remained in force so long as the note was not discharged; but such is not our view of the case. The note was in force until all assessments for losses incurred during the continuance of the policy are paid and it is regularly discharged, and the note is not liable to be discharged until the policy is regularly discharged on the books of the company. It remains subject to assessments till the discharge of the policy, or till such notice to the officers of the company of a surrender, assignment of the property, or other cause of discharge as would make it their duty to discharge it. In the language of Beardsley, J., in Neeley v. Onondaga Ins. Co., before cited, 'although the plaintiff's policy became void by the alienation of the property, it does not follow that his deposit note was also void. On the contrary, until he surrendered his policy, and paid his proportion of all losses which accrued prior to such surrender, the deposit note remained

that the policy once attached is a valid consideration for the premium note, which remains in force, notwithstanding the release or discharge of the policy, till the discharge is communicated to the office and the assessment and dues are paid.[142] So where the company was insolvent, it was held that the maker, by failing to return the policy as worthless, was obligated to pay the note.[143] So installment notes may be binding, although the policy has been forfeited, where there is an express agreement therefor.[144]

§ 1226. Liability after Termination of Contract or Surrender of Policy.—If one insured for a short time has the right to terminate his contract, and he gives notice of his election so to do, to which the company makes no reply, no recovery can be had on his premium notes after the pol-

obligatory upon him' ": See Neeley v. Onondaga Co. Mut. Ins. Co., 7 Hill (N. Y.), 49; Indiana Mut. F. Ins. Co. v. Coquillard, 2 Ind. 645; Indiana Mut. Ins. Co. v. Connor, 5 Ind. 170. Examine sec. 1215. herein, and the cases of Miner v. Judson, 5 N. Y. S. C. 46; 2 Hun (N. Y.), 441; 2 Lans. (N. Y.) 300; Tuckerman v. Bigler, 46 Barb. (N. Y.) 395, noted therein. See, also, Crawford Co. Mut. Ins. Co. v. Cochran, 88 Pa. St. 230, where it was held that the levying of a second assessment during a default in the payment of a former one did not operate as a waiver of the company's right to demand the latter, nor did it thereby remove the disabling consequences flowing from the neglect to pay such assessments. "As long as the assessment remained unpaid beyond thirty days after being duly demanded, so long the protection of the policy continued suspended. . . . . An acceptance of its payment at any time before the fire would have restored its efficiency. If the holder thereof was in default when the loss was sustained, the company was not bound to afterward accept payment of the assessment. There was, therefore, no evidence that the company before the fire waived any right which it had acquired by reason of the default in the payment of the assessment," per the court. Contra Nelson v. Trumbull Ins. Co., 19 Pa. St. 372. Premium note in mutual fire company to be surrendered when insurance ends: Rev. Stats. Me. 1883, p. 447, c. 49, sec. 27; citing Leary v. Blanchard, 48 Me. 274; Brown v. Donnell, 49 Me. 425; Union Ins. Co. v. Greenleaf, 64 Me. 128.

[142] Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[143] Graff v. Simmons, 58 Ill. 440.

[144] Blackerby v. Continental Ins. Co., 83 Ky. 574. See further on this subject secs. 1370-1373, post, as to waiver of forfeiture by subsequent assessment.

icy has expired.[145] So where a rescission of the contract by the assured is not made until after the first installment of the premium note becomes due, he is liable for dues until the rescission.[146] Although a petition has been filed, yet if, before the receiver is appointed, the maker of a premium note pays an assessment and surrenders his policy, under an agreement with an authorized agent of the company that such payment shall be in full, the note is extinguished.[147] But where a member withdraws from the company and surrenders the policy, it is held that he is not liable thereafter upon a note which is in effect given as a mere security for losses, subject to assessments therefor, and which there was never an absolute promise to pay, although the note, representing three-quarters of the entire premium for the period, was carried.[148] But notes for the security of those concerned given in lieu of capital stock cannot be surrendered when needed for the debts by the trustees at the request of the makers where there is no consideration, except an agreement by the latter to claim nothing from the company for their use.[149]

§ 1227. Liability after Suspension on Note for Entire Premium.—If a note is given for the entire premium, the company may recover the full amount, although the term of the policy has not expired, and even though there is a stipulation in the policy that failure to pay said note on maturity will operate to suspend the company's liability.[150]

[145] Home Ins. Co. v. Burnett, 26 Mo. App. 175.

[146] American Ins. Co. v. Garrett, 71 Iowa, 243; 3 N. W. Rep. 356.

[147] Sands v. Hill, 55 N. Y. 18; 42 Barb. (N. Y.) 651.

[146] In this case the charter provided for an assessment ratably upon the members to meet deficiencies where the losses exceeded the funds on hand, and there was no evidence of such assessments. It also appeared, however, that the insured paid the company in cash very nearly the full value of the risk carried before the policy was surrendered: Mutual B. L. Ins. Co. v. Jarvis, 22 Conn. 133, Ellsworth, J., dissenting.

[149] Maine Mut. M. Ins. Co. v. Pickering, 66 Me. 130. See Mansfield et al. Trustees v. Cincinnati Ice Co. (Ohio C. P. 1892), 28 Week. L. Bull. 113.

[150] McEvoy v. Nebraska & I. Ins. Co., 46 Neb. 782; 65 N. W. Rep. 888.

§ 1228. Extent of Liability after Part Payment of Note.—A member can only be assessed for future losses to the face of the premium note where he has partly paid the amount thereof.[151]

§ 1229. Liability after Loss.—If the contract so provides, recovery may be had on a premium note after loss, even though the policy is suspended.[152] So it is also held that although there has been a total loss of the property insured by a mutual fire insurance company, yet the assured is liable for the payment of assessments made upon his premium note for his just proportion of all losses sustained by the corporation during the entire period mentioned in his policy of insurance.[153] But in case the note is one given in advance for assessments for insurance, and a default occurs in payment thereof, it is held that recovery may be had for a loss.[154] So a liability may exist upon a deposit note, although the property is destroyed and the loss paid.[155] So where a note is payable in such portions and at such times as may be required under the act of incorporation, and in case of default in paying an assessment the whole note might be collected and paid into the company's hand,s and retained to meet losses and expenses during the term of the policy, which was six years, and the property was destroyed in two years, it was held that the maker was liable on said note for the entire period of six years, notwithstanding said loss, and that no liability for damages in excess of the sum limited in the policy existed in the insured.[156]

§ 1230. Liability Incurred by Default in Payment of Assessment.—The contract may provide that upon nonpayment of an assessment on a premium note, the whole amount

[151] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771; distinguishing Kennan v. Rundle, 51 N. W. Rep. 426.
[152] Robinson v. Insurance Co., 51 Ark. 441.
[153] Swamscot Machine Co. v. Partridge, 25 N. H. (5 Fost.) 369.
[154] King v. Mutual Ins. Co., 20 N. H. 198.
[155] Bangs v. Seidmore, 21 N. Y. 136; 24 Barb. (N. Y.) 29.
[156] New Hampshire Mut. F. Ins. Co. v. Rand, 24 N. H. 428.

of the note shall thereupon become due and payable, and such provision is enforceable in an action on the note, and it is held to be unnecessary to declare specially thereon.[157] So an agreement may be enforced which provides that nonpayment of an installment shall operate to forfeit the policy, and the company's liability cease until payment, and the whole note shall become due.[158] If the maker becomes, under the company's charter, liable to pay the whole amount of his premium note by failing to pay an assessment when due, the company is entitled to retain the note until all losses are paid, for which an assessment on said note may be made.[159] The company may also under the contract be not liable for a loss occurring during the default, and yet the note be recoverable even after such loss.[160]

§ 1231. Liability in Case of Insolvency of Company. A note for premiums in advance given as security for dealers with the company passes to the receiver of the company on its being declared insolvent.[161] So a note given upon the formation of the company and constituting part of its capital stock, and payable absolutely, may upon the company's insolvency be collected by its receiver.[162] But the fact that a mutual company has become insolvent and its effects have gone into the hands of a receiver will not increase the liability of members upon their deposit notes, where the general act of incorporation under which the company was formed provides that members of such organizations are only liable to pay upon

[157] Jones v. Sisson, 6 Gray (Mass.), 288; Bangs v. Bailey, 37 Barb. (N. Y.) 630; Limerick v. Gorham, 37 Kan. 739.

[158] Continental Ins. Co. v. Baykin, 25 S. C. 323.

[159] St. Louis etc. Ins. Co. v. Boeckler, 19 Mo. 135.

[160] Palmer v. Continental L. Ins. Co., 31 Mo. App. 467; Beadle v. Chenango Co. Mut. Ins. Co., 3 Hill (N. Y.), 161. If it is stipulated that the full premium shall be deemed earned in case of nonpayment of a premium note at maturity, the company may after default demand payment of the overdue premium without such demand operating as a waiver of the forfeiture: Laughlin v. Fidelity Mut. L. Assn. (Tex. C. C. A. 1894), 28 S. W. Rep. 411.

[161] Cruikshank v. Broumer, 11 Barb. (N. Y.) 228.

[162] White v. Haight, 16 N. Y. 310; Hart v. Achilles, 28 Barb. (N. Y.) 576.

their premium notes their proper shares of the losses and damages sustained by the members.[163] Again, the insured in a marine policy on a ship for a year is not entitled to have his premium note given up, on canceling his policy and paying pro rata for the time expired, in the event of the insurer becoming bankrupt while the policy is running;[164] and the maker of a premium note or note for the security of dealers is liable thereon, notwithstanding the insolvency of the company before the expiration of the policy.[165] Nor is it of any consequence that the note was a renewal note, and past due,[166] since a resolution of a mutual insurance company to wind up its affairs is in legal effect an assessment of one hundred per centum on the premium notes to enable it to meet its liabilities and divide its excess, if any.[167] But where a note was given for balances unpaid on cash premiums for prior years on a life policy, and which note included the premiums for the ensuing year, and the company became insolvent, went into liquidation, and notified the insured that the contract was terminated, it was held that an action on the note by the insurer's assignee brought after the debts were all paid could not be sustained.[168] And where after the filing of the petition, but before the publication of notice and appointment of a receiver, an assessment was paid by the maker of a note, who surrendered his policy, the same being done in full satisfaction and surrender of the note under an agreement therefor, it was held that no further liability existed on said note, and the receiver could sustain no action therefor, notwithstanding a statutory provision that all transfers of choses in action and assets of a corporation were void when made after the petition

[163] Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

[164] Hone v. Boyd, 1 Sand. (N. Y.) 481.

[165] Sterling v. Mercantile Mut. Ins. Co., 32 Pa. St. 75. See Hone v Allen, 1 Sand. (N. Y.) 171, n.; Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433; Deraismes v. Merchants" Mut. Ins. Co., 1 Comst (N. Y.) 37. But see Farmers' etc. Ins. Co. v. Smith, 63 Ill. 187.

[166] Hone v. Allen, 1 Sand. 171, n. See Hone v. Ballin, 1 Sand. (N. Y.) 181; Hone v. Folger, 1 Sand. (N. Y.) 177.

[167] Conigland v. North Carolina M. Ins. Co., 1 Phill. Eq. (N. C.) 341; 98 Am. Dec. 89.

[168] Bostick v. Maxey, 5 Sneed (Tenn.), 173.

for dissolution in payment of or as security for a debt.[169] And after insolvency of the company, and before decree, the maker of a premium note cannot escape liability by surrendering his policy and paying a small per cent on the notes by agreement with the officers of the company.[170] The fact that the company has ceased to do business, and has made an assignment in insolvency for its creditors, does not entitle the makers of deposit notes to have them canceled without paying assessments for losses during the time they had the benefit of insurance, such notes being given to cover future assessments, and this is so although they may have been misled as to the amount of the guaranty fund for partial protection against assessments; it appearing that they deferred asking relief until after such insolvency.[171]

§ **1232. Insolvency of Maker of Note.**—If the maker of the note becomes insolvent or bankrupt, and is discharged of his debts, the contract between the parties is thereby terminated; it ceases to be mutual and the insurer is released;[172] and so although interest is paid on the premium note after the maker becomes bankrupt, where such fact is not known to the company, and they have no actual notice of the proceedings in insolvency and the assured's discharge until after such payment.[173]

§ **1233. Interest on Premium Notes—Forfeiture.**—In life insurance the nonpayment of interest on premium notes will not work a forfeiture unless the contract so provides.[174] So where the contract does not clearly so stipulate, and there would be no forfeiture for nonpayment of the principal, and the company has sufficient funds of the assured in its hands

[169] Sands v. Hill, 55 N. Y. 18, under 2 N. Y. Rev. Stats. 469, sec. 71, relating to the "voluntary dissolutions of corporations."

[170] Doane v. Milville Mut. M. etc. Ins. Co., 43 N. J. Eq. 522; 10 Cent. L. J. 670; 17 Ins. L. J. 393.

[171] Corey v. Sherman (Iowa, 1895), 64 N. W. Rep. 828.

[172] Reynolds v. Mutual F. Ins. Co., 34 Md. 280; 6 Am. Rep. 357. See Young v. Eagle F. Ins. Co., 14 Gray (Mass.), 150.

[173] Reynolds v. Mutual F. Ins. Co., 34 Md. 280; 6 Am. Rep. 357.

[174] Gardner v. Union Central L. Ins. Co., 5 Fed. Rep. 430.

to pay the interest, the policy will not be forfeited for nonpayment of interest on premium notes.[175] But if such policy provides for the payment of interest on the premium note at a specified day, otherwise the policy shall be forfeited, time is of the very essence of the contract, and noncompliance with such condition forfeits the policy.[176] And equity will not relieve against such forfeiture,[177] in the absence of a waiver or estoppel. But if, where an insurance company wrongfully and in violation of the policy demands payment of a greater per cent of interest on outstanding premium notes than is payable thereon, and gives notice that a less rate will not be received if tendered, and that no other premiums will be received on the policy unless the rate per cent demanded is paid, a subsequent nonperformance of the conditions by the insured is excused.[178] If the premium is to be paid partly in cash and partly by notes, the interest payable annually, such interest becomes practically a premium, which must be promptly paid where so stipulated to prevent a forfeiture.[179] And nonpayment of interest on premium notes which are in effect loans will not operate to effect a forfeiture, notwithstanding the policy so stipulates.[180] And premiums do not comprehend loans indorsed as such on the policy so that nonpayment of interest thereon will constitute a forfeiture,[181] and the contract may provide for the payment of the annual premium, one-half in cash and the other half to remain as a loan, bearing interest the same, together with all other credits and indebtedness to be deducted from the sum insured, and the policy is to be

[175] Northwestern Mut. L. Ins. Co. v. Frost, 82 Ky. 269.

[176] Knickerbocker L. Ins. Co. v. Dietz, 52 Md. 16; Holman v. Continental L. Ins. Co., 54 Conn. 195; Knickerbocker L. Ins. Co. v. Harlan, 56 Miss. 512; People v. Knickerbocker L. Ins. Co., 103 N. Y. 480.

[177] Knickerbocker Life Ins. Co. v. Dietz, 52 Md. 16.

[178] Phœnix Mut. L. Ins. Co. v. Himesley, 75 Ind. 1.

[179] Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727. See, also, Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988.

[180] Bruce v. Continental L. Ins. Co., 58 Vt. 253. See St. Louis etc. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310. Compare Anderson v. St. Louis etc. Ins. Co., Big. L. & A. Cas. 527; 1 Flip. (U. S.) 559. Contra, Patch v. Phœnix Mut. L. Ins. Co., 44 Vt. 481.

[181] Gardner v. Union Cent. L. Ins. Co., 5 Fed. Rep. 438.

forfeited if the premiums and interest on the note or credit given be not paid annually in advance. In such case the contract will be so construed as to mean that so much of the premium as was unpaid became a loan, bearing interest so long as it was retained as such from the time the premium became due up to the maturity of the note.[182]

§ **1234. Tender—Premium Notes.**—A tender at the maturity of an installment on a note given for the premium made before loss is valid where the policy does not provide for forfeiture for nonpayment when due, although it does stipulate that the company shall not be liable for a loss occurring while any note for the premium remains due and unpaid.[183] And the amount of premium due upon tender of which the assured is entitled to a renewal does not include interest on premium notes previously given, where there is no provision in the policy that the nonpayment of said interest shall work a forfeiture.[184]

§ **1235. Payment of Premium Notes or Interest Thereon by Dividends or Profits.**[185]—It is held that even though the policy provide for forfeiture for nonpayment of interest on premium notes, the fact that the contract also provides that the insured shall be entitled to share in the profits necessitates the application of his share of the dividends to the payment first to the interest, in order to prevent a forfeiture, and then to the notes,[186] even though the policy also provides

[182] MacIntyre v. Cotton States L. Ins. Co., 82 Ga. 478; 9 S. E. Rep. 1124.

[183] Continental Ins. Co. v. Miller, 4 Ind. App. 553; 30 N. E. Rep. 718.

[184] Mutual L. Ins. Co. v. French, 30 Ohio St. 240.

[185] See, also, sec. 1166, herein.

[186] Brooks v. Phœnix etc. Ins. Co., 16 Blatchf. (C. C.) 182; 8 Ins. L. J. 741; Northwestern Mut. L. Ins. Co. v. Fort, 82 Ky. 269; Ky. L. Rep., Nov. 1884; Ins. L. J., Jan. 1885; St. Louis etc. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727; Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988, as to the doctrine "that a company having in its possession dividends to the credit of a policy holder is bound to so apply them as to prevent a forfeiture if it has the power; nor is it

that such shares shall be applied on the principal of the notes.[187] So it is held that if an endowment policy provides for the payment of a certain proportionate sum of the amount of the policy on default in payment of premiums, conditioned that the premium notes are taken up or the interest paid thereon annually in cash until the notes are canceled by the return of the surplus, otherwise the policy will be forfeited, unless one or more annual premiums has been paid in full, in cash, or by dividends, such condition is binding upon the assured, and although there is a default in payment of the interest, it is obligatory to apply the dividends in payment of the note if sufficient, and so save a forfeiture. It is also decided that the amount of the interest being only four cents, it is too trifling to note a default in its payment.[188] A policy may be for life with the total amount of premiums payable in a specified time with a participation in the profits. It appeared in such a case that the annual premiums were payable in cash and a premium note given for part, and there was a condition that such notes should be paid out of the dividends. New notes were given on maturity of each note, including the amount due on the old note, less the dividends, and it was held that the right to participate in dividends continued during the natural life of the assured.[189] But under the New York

necessary that such dividends should have been declared and actually due to the policy holders": See note to Girard L. Ins. Co. v. Mutual L. Ins. Co., 97 Pa. St. 15; 10 Ins. L. J. 273-75, where the editor concludes as follows: "While the general doctrine laid down in the case of the mutual life insurance company above is very broad in its language, it would seem, after all, as if it must be viewed in connection with the special facts of that case, rather than the enunciation of a general principle applicable to cases where the company had no sufficient ground for assuming that the assured would wish his dividends applied in a particular way": Id. 275. The Girard Life Insurance Company's case is, however, approved as resting on solid principle by the court, per Elliott, J., in Franklin L. Ins. Co. v. Wallace, 93 Ind. 7, 11.

[187] Mut. L. Ins. Co. v. Fort, 82 Ky. 269; Ky. L. Rep., Nov. 1884; Ins. L. J., Jan. 1885.

[188] Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988. See Dutcher v. Brooklyn Ins. Co., 3 Dill. (C. C.) 87.

[189] Dutcher v. Brooklyn Ins. Co., 3 Dill. (C. C.) 87; 8 Fed. Cas. 147; 2 Cent. L. J. 153; 4 Ins. L. J. 812.

statute the right to participate in profits is ended by the issuance of temporary or paid-up insurance.[190] So the right to share in future dividends may be lost, although the premium notes are in the nature of a permanent loan to the policyholder, to be paid out of dividends to be declared, or by a deduction from the policy when payable, where the policy is forfeited by the nonpayment of annual premiums and the annual interest as stipulated.[191] But where the charter required the interest on the deposit notes to be paid annually on or before a certain day, or the policy would be suspended, and no liability for loss existed on the part of the company while it was due and unpaid, it was held that profits accrued on the policy should not be applied to the interest, so as to charge the company with liability for a loss in such case, the by-laws providing only that the profits be calculated annually and credited to the members, but that dividends should be declared only every ten years.[192]

§ **1236. Effect of Nonpayment of Note upon Beneficiary.**—It is held that the fact that a policy is forfeited as stipulated by the nonpayment of premium notes cannot be avoided by one who has a beneficial interest in the policy, by reason alone of that circumstance.[193] But in another case where the annual premium note was considered as evidence of a loan, it was held that the company was obligated to enforce the payment of the annual interest thereon, and that the beneficiary could not be affected by the default in payment of interest by him to whom the loan was made.[194]

§ **1237. Deduction of Note from Loss.**[195]—In marine insurance the usual provision in policies is that the amount of the note given for the premium if unpaid shall be first de-

[190] 3 N. Y. Rev. Stats., 8th ed., p. 1688.

[191] Northwestern Mut. L. Ins. Co. v. Bonner, 36 Ohio St. 51.

[192] Mutual F. Ins. Co. v. Miller Lodge, 58 Md. 563.

[193] Continental Ins. Co. v. Daly, 33 Kan. 601.

[194] St. Louis Mut. L. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310. See Patch v. Phœnix Mut. L. Ins. Co., 44 Vt. 481, where the policy was held forfeited under nearly the same facts.

[195] See secs. 1239, 1311, herein.

ducted from the loss, and in such case the insurers will be allowed to deduct the premium note whenever liable for a loss,[196] and so whether the note be given by the principal or his agent.[197] So in other than marine policies the stipulation frequently is that the amount due on an unpaid premium note shall be deducted from the amount payable, in which case it may be deducted.[198] But it is held that a claim for a partial loss is unliquidated in its nature, and cannot be the subject of setoff under the statute, and in a suit upon a marine policy to receive a contributory share from the insurers payable to the insured on the adjustment of the general average after a partial loss, it is held that promissory notes due from the insured cannot be setoff, even though the amount due on the policy has been assented to, provided the setoff were permitted.[199] Whenever the right under the terms of the policy to deduct an unpaid premium note exists, the fact that the note is long past due, or that the statute of limitations has run against it, will not prevent the exercise of the right;[200] and where the contract expressly provides that the company shall have the right to deduct premiums or interest, or any notes given for the premiums, and shall not be liable only for the excess in case of loss, such stipulation does away with the necessity of paying annual interest-bearing premium notes given for a part of the annual premium.[201] So where annual interest-bearing premium notes were given, it was held a loan, the amount of which, with interest due thereon, must be deducted from the amount payable under the policy, even though the assured had defaulted in payment of interest thereon.[202] But in another case where the facts were substantially the same, it

[196] Livermore v. Newburyport Ins. Co., 2 Mass. 232; Hurlburt v. Pacific Ins. Co., 2 Sum. (C. C.) 471; Wiggin v. American Ins. Co., 18 Pick. 158.

[197] Hurlburt v. Pacific Ins. Co., 2 Sum. (C. C.) 471.

[198] Currier v. Continental L. Ins. Co., 31 Mo. App. 467; Van Norman v. Northwestern Mut. L. Ins. Co., 51 Minn. 57; 52 N. W. Rep. 988.

[199] Diehl v. General Mut. Ins. Co., 1 Sand. (N. Y.) 257.

[200] Alexander v. Continental Ins. Co., 67 Wis. 422; 30 N. W. Rep. 727.

[201] Olide v. Northwestern L. Ins. Co., 40 Iowa, 357.

[202] St. Louis Mut. L. Ins. Co. v. Grigsby, 10 Bush (Ky.), 310.

was held that nonpayment of the interest forfeited the policy.[203]

§ **1238. Counterclaim on Note of Owner of Vessel Insured for Benefit of Mortgagee.**—If shipowners insure the vessel for the benefit of the mortgagee, a valid counterclaim exists in favor of the insurer to the extent of the amount of a premium note due it from the owners of the vessel at the time of action brought, although it is not on the policy sued on in said action.[204]

§ **1239. Amount of Recovery on Premium Notes.**—Where premiums have been paid for risks at time of insurance, they cannot be deducted from the premium note;[205] nor is the insured entitled to any deduction from the premium note or assessments thereon because the charter of the company expires before the expiration of the policy, as this still continues in force.[206] But the premiums earned against the insured while a note for the security of dealers is running should be deducted on his paying the amount of such premiums, and he is not liable for such premiums in addition to the amount of his subscription note.[207] And in case of a deposit note, it may be reduced by the amount of all previous assessments without interest where the said note has become due by reason of default in nonpayment of assessments.[208] Such being the contract, the maker of a note for the security of dealers in a mutual company is entitled to have credited thereon not only premiums on his own insurances, but premiums on policies of others whom he has induced to insure, and such transaction cannot be questioned by the company or its creditors.[209] Another question is, however, involved in such cases, since as

[203] Patch v. Phœnix Mut. L. Ins. Co., 44 Vt. 481.

[204] Murray v. Great Western Ins. Co., 72 Hun (N. Y.), 282; 55 N. Y. St. Rep. 748; affirmed without opinion, 147 N. Y. 711.

[205] Howard v. Hinckley etc. Iron Co., 64 Me. 93.

[206] Huntley v. Beecher, 30 Barb. (N. Y.) 580.

[207] Merchants' Mut. Ins. Co. v. Leeds, 1 Sand. (N. Y.) 183.

[208] Bangs v. Bailey, 37 Barb. (N. Y.) 630; Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

[209] Emmett v. Reed, 4 Sand. (N. Y.) 229; affirmed, 8 N. Y. 312.

between the immediate parties to a note the consideration may be inquired into, and this may be only so much of the premium as is actually earned, and the latter is the amount actually due; therefore, whether there should be a return premium, and the right of the insured to have such returned premium deducted from the amount of the note, are important, and it is held that the indorser in a suit on a premium note is entitled to have the return premium applied to its reduction.[210] So the maker of a premium note given to a mutual insurance company for the nominal premium upon an open policy executed to cover such risks as may be afterward indorsed thereon is liable to the company, or to a receiver of its effects, on such note only to the amount of the actual premiums upon risks assumed by the company and indorsed on the policy.[211]

[210] Phœnix Ins. Co. v. Fiquet, 7 Johns. (N. Y.) 384.

[211] Lawrence v. McCready, 6 Bosw. (N. Y.) 329; Elwell v. Crocker, 4 Bosw. (N. Y.) 22.

CHAPTER XXXII.

ASSESSMENTS.

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§ **1245. Assessment Defined—Consideration.**—An assessment is a sum specifically levied in mutual benefit insurances upon a fixed and definite plan within the limit of the company's or society's fundamental law of organization to pay

losses, or losses and expenses incurred. They are to a certain degree, substantially the equivalent of premiums, and form the pecuniary consideration of the contract;[1] that is, a promise to pay duly authorized assessments on call is a consideration of a member's insurance benefits as a member.[2] A periodical payment of a certain sum stipulated for under a certificate is not an assessment within a statute specifying what the notice of an assessment shall contain.[3]

§ **1246. Assessments—Generally.**—The plan of organization of mutual insurance companies or societies may, and does necessarily, affect the character of the assessment as well as its amount. Such plan may provide that the members shall receive no money as profits or dividends, or that the money collected shall be applied only to the payment of death benefits; or it may provide a guaranty fund or reserve fund for the payment of losses. The society may agree to levy an assessment of a certain sum upon each member to pay a death claim, or to pay a certain sum upon death, or as many dollars as there are members or as are collected, or the charter may only authorize an assessment to pay losses, or the company may be vested with a discretion to hold the reserve fund and levy an assessment for losses, or to use part or all of such fund therefor.[4] Again, there are other plans which have been

[1] "The ascertainment and declaration of death losses is left to the members of the association, and their action in that behalf is known as an assessment": Ellerbe v. Barney, 119 Mo. 632, 641, per Martin, J.; 23 Ins. L. J. 356; 25 S. W. Rep. 384. See Commonwealth v. Wetherbee, 105 Mass. 149, per Gray, J.; State ex rel. v. Monitor F. Assn., 42 Ohio St. 555, 565.

[2] Ellerbe v. Barney, 119 Mo. 632; 23 Ins. L. J. 356; 25 S. W. Rep. 384.

[3] Smith v. Bown, 75 Hun (N. Y.), 231; 58 N. Y. St. Rep. 605, under Laws N. Y. 1883, c. 175.

[4] See In re Solidante Mut. B. Assn., 68 Cal. 392; State v. Monitor F. Assn., 42 Ohio St. 555; Thomas v. Whallom, 31 Barb. (N. Y.) 172; Wadsworth v. Jewelers' & Tradesmen's Co., 132 N. Y. 540; Bersch v. Sinissippi Ins. Co., 82 Ind. 64; State v. Bankers' etc. Assn., 23 Kan. 499; Mygatt v. New York Prot. Ins. Co., 21 N. Y. 52; Crossman v. Massachusetts B. Assn., 143 Mass. 435; 9 N. E. Rep. 753; Rosenberger v. Washington F. Ins. Co., 87 Pa. St. 207; Union Ins. Co. v. Hoge, 21 How. (U. S.) 35.

noted heretofore,[5] so that it is clearly apparent that the amounts and times of payments of assessments must vary, in that they must depend largely upon the particular plan or scheme contemplated by the fundamental law of the company or society, and they are in fact a mutual contribution for the purpose specified in the fundamental law.

§ 1247. Distinction between Premiums and Assessments.—A distinction has been made between a premium and assessment. Thus, an annual deposit of a definite sum in lieu of an assessment, based upon the mortality tables, the certificate being subject to forfeiture unless said amount be paid in advance each year, and which sum is ascertained without reference to assessments for actual losses and expenses during the year, is declared to be a premium or price for assuming the risk, and not an assessment to pay losses and expenses as they may arise. And a by-law of a society which provides for such annual deposit instead of an assessment for which the charter only provides, and which is to be made specifically in accordance therewith, is held ultra vires and void.[6] Again, where the certificate of a co-operative assessment insurance company, in conformity with the by-laws, provides for the payment of a specified sum, and a further bi-monthly payment of a certain sum, such periodical sum is not an assessment, even though so denominated, but is to all intents and purposes a bi-monthly premium, subject to no change of amount or date of payment during the continuance of the membership, and is unaffected by death losses, or other vicissitudes of business, but is a certain sum which the defendant has contracted to pay on the issuance of the certificate, and is not within the purview of a statute requiring what the notice of an assessment shall state.[7]

§ 1248. Membership Fees and Dues—Generally.—In mutual benefit associations, if the payment of a specified sum

[5] Section 343 herein.

[6] Staten ex rel. v. Monitor F. Assn., 42 Ohio St. 555.

[7] Smith v. Brown, 75 Hun (N. Y.), 231; 27 N. Y. Supp. 11, under New York statute concerning requirements of assessment notices: Laws 1883, c. 175.

known as a membership fee is conditioned to be paid in advance, and the certificate is not to be in force until the same is paid, such stipulation is a condition precedent, which must be observed,[8] and it is held that such provision cannot be waived by an agent of the company.[9] And the contract sometimes provides not only for the payment of such membership fee and for voluntary assessments, but also for the payment of a certain stated sum at specified times for expenses, such as quarterly, semi-annual, or annual dues. In cases where the society is of the kind having supreme and subordinate lodges, and the member is obligated to contribute to the support of the lower lodge in certain sums payable at specified times, such amounts so to be paid are designated as dues. These differ from the mortuary assessments levied by the higher lodge, and from dues for insurance purposes, which may be payable to the supreme lodge.[10] And in some cases, instead of what are known as membership fees, each person becoming a member may be required to pay what is designated as a "first assessment"; [11] so that membership fees, dues, and assessments may all be important factors in determining the right to membership and its continuance. If credit is given for the membership fee, as where a note is taken therefor, the question of forfeiture may depend upon whether or not the policy or certificate provides for forfeiture or suspension for nonpayment of the note at its maturity; if it so provides, there is a forfeiture or suspension according to the terms of the stipulation, otherwise not.

§ **1249. Validity of Provisions as to Assessments.**—The parties to a contract of insurance in a mutual company may validly stipulate that the policy shall be for-

[8] Ormond v. Fidelity L. Assn., 96 N. C. 158.

[9] Ormond v. Fidelity L. Assn., 96 N. C. 158.

[10] See further on this subject, sec. 407, herein.

[11] Wadsworth v. Jewelers' & Tradesmen's Co., 132 N. Y. 540; 42 N. Y. St. Rep. 765; 29 N. E. Rep. 1104, affirming 31 N. Y. St. Rep. 185. "It also appears that the deceased was one of the charter members, and paid with his associates what was termed a 'first assessment,' in addition to the fixed dues for admission. If they thus voluntarily created a small death fund in advance, it is probable that

feited for nonpayment at or within a specified time of assessments on premium note, and such provision is binding;[12] and the same is true in regard to conditions whereby the policy is made void or the risk suspended for nonpayment of dues or assessments, as in like cases of provisions for forfeiture for nonpayment of premiums, and as to such provisions, in so far as they are lawful and not against public policy, the courts cannot interfere,[13] and such provisions are as effectual, when included in an application which is made part of the policy, as if contained in the policy itself;[14] and the rule would obtain as to similar provisions contained in any part of the contract, as in case of the charter and by-laws.

§ 1250. Assessment Premium, etc., Notes—Generally. Unless the charter, by-laws, or note otherwise provide, premium notes given to a mutual fire insurance company are liable to assessments for losses during the whole period for which the member was insured;[15] but the power to make assessments must be limited by the amount of losses sustained and unpaid at the time of levying the assessment,[16] and the assessment must be legally made.[17] Although interest-bearing notes may not be assessable in the first instance, yet they may be assessable under the by-laws after other collectible assessments have been paid in, equal to the interest payable and

they did so in view of the contingency that a death claim might arise while the company was too weak to meet it in the usual course of its business": Id. 543, 544.

[12] Beadle v. Chenango Co. Mut. Ins. Co., 3 Hill (N. Y.), 16. In this case the provision was "in case the insured shall neglect to pay any assessment, the insurance shall be void."

[13] See Madeira v. Merchants' Exch. Mut. etc. Co., 16 Fed. Rep. 749; Ewald v. Northwestern Mut. L. Ins. Co., 60 Wis. 431. See, also, secs. 1100, 1205, 1220, herein.

[14] Mandego v. Centennial Mut. L. Assn., 64 Iowa, 134; 19 Ins. L. J. 660; 17 N. W. Rep. 656. In this case the provision was that a failure to pay dues or assessments should avoid the policy.

[15] New Hampshire etc. Ins. Co. v. Rand, 24 N. H. (4 Fost.) 428.

[16] Sinissippi Ins. Co. v. Taft, 26 Ind. 240; Sinissippi Ins. Co. v. Farris, 26 Ind. 342; Insurance Co. v. Jarvis, 22 Conn. 133.

[17] Insurance Co. v. Jarvis, 22 Conn. 133.

to be paid for a specified period.[18] A member of a mutual company can only be assessed to the remaining face value of a premium note where he has partly paid the principal.[19] Deposit notes must be assessed in the usual way when under the by-laws they are not considered as absolute funds, but as assessable notes.[20] So, if the by-laws provide that those giving advance notes shall become members, and the directors may, if they deem best for the company's interest, surrender any and all advance notes, and a note is given subject to assessments at a certain per cent with all other advance notes, it is held that all uncanceled advance notes are subject to assessment, even to the full amount if necessary.[21] In all cases, however, involving the right to assess premium notes the terms of the particular contract and the character of the note must govern.[22]

§ 1251. Who Liable to Assessments—What Members. Only members or those who have assumed a contract obligation to pay assessments are liable therefor.[23] But the contract whereby the membership exists must be completed before a liability to pay assessments can exist; the fact that an application only is made and the policy never accepted cannot render one liable, as a member, to assessments.[24] All persons who are members are equally liable, and the directors have no right to consider the length of time the membership has existed;[25] but only those who belong to a certain class

[18] Crawford v. Susquehanna Mut. F. Ins. Co. (Pa. 1888), 11 Cent. Rep. 653; 12 Atl. Rep. 844.

[19] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771; distinguishing Kennan v. Rundle, 81 Wis. 212; 51 N. W. Rep. 426.

[20] Citizens' etc. Ins. Co. v. Lortwell, 10 Allen (Mass.), 110.

[21] Maine etc. Ins. Co. v. Swanton, 49 Me. 448.

[22] See chap. xxxi, herein, and sections under this chapter.

[23] See Philbrook v. New England Ins. Co., 37 Me. 137; McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87, per Hardin, J.; Commonwealth v. Massachusetts Mut. Ins. Co., 112 Mass. 116; Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913. See, also, subsequent cases under this and the following section.

[24] Real Estate Mut. F. Ins. Co. v. Roessle, 1 Gray (Mass.), 336.

[25] Herkimer Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; 7 How. Pr. (N. Y.) 210; Planters' Ins. Co. v. Comfort, 50 Miss. 662. See Marblehead

can be assessed in that class to which they belong where there are separate classes.[26] So members of a corporation existing in one state may not be made liable under a by-law to pay assessments levied by a supreme lodge incorporated in another state, since it is not competent for a domestic corporation to subject its members in this way to a foreign authority.[27] If the act of incorporation of mutual fire companies is to take effect when accepted by the members of all the corporations to which it relates, no member is bound thereby who does not expressly assent thereto.[28] Again, if the charter provides that no benefits shall be paid to one who has ceased to be a member, and that deaths shall be reported by trustees, their report is not conclusive as to the fact of memberships.[29] No distinction as to the age of the policies should be made where the assessment is to be levied in proportion to deposits and premiums.[30] Unless so provided in the contract, a mutual assessment company has no power to charge a member with an assessment made before he became a member, or to assess members for prior losses, and no forfeiture can be based upon such invalid assessment;[31] and the same rule applies where one has ceased to be a member.[32] If all the members are assessed for losses and expenses accrued before some of them became members, the assessment is void as to the latter, but valid as to the others.[33]

Mut. F. Ins. Co. v. Hayward, 3 Gray (Mass.), 208; People's Equitable Mut. F. Ins. Co. v. Arthur, 7 Gray (Mass.), 267.

[26] Allen v. Winne, 15 Wis. 113; Miller v. Georgia Masonic Mut. L. Ins. Co., 57 Ga. 221; Kelly v. Troy Ins. Co., 3 Wis. 254. But see sec. 1298, herein.

[27] State ex. rel. Miller, 66 Iowa, 26; Lampshire v. Grand Lodge A. O. U. W., 47 Mich. 429.

[28] Hamilton Mut. Ins. Co. v. Hobart, 2 Gray (Mass.), 543.

[29] Dillingham v. New York Cotton Exch., 49 Fed. Rep. 719.

[30] Commonwealth v. Massachusetts Mut. etc. Ins. Co., 112 Mass. 116.

[31] Evarts v. United States Mut. Acc. Assn., 61 Hun (N. Y.), 624; 40 N. Y. St. Rep. 848; 16 N. Y. Supp. 27; Roswell v. Equitable Aid Union, 13 Fed. Rep. 840; Commonwealth v. Mechanics' Mut. Ins. Co., 112 Mass. 192.

[32] Mutual B. L. Ins. Co. v. Jarvis, 22 Conn. 133.

[33] Roswell v. Equitable Aid Union, 13 Fed. Rep. 840; Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray (Mass.), 77.

§ 1252. Who Liable to Assessment—Mortgagee—Assignee.—If a mortgagee is under the by-laws, to be liable for assessments provided the original insured, the mortgagor, shall not pay the same on demand, a failure of the mortgagor to pay the assessment cannot affect the mortgagee's right to recover.[34] An assignee is not liable to assessments where he has not agreed to become a member, and is under no contract to assume the liabilities of the assignor to the company or to pay assessments.[35] And although the policy stipulates that in case of assignment the assignee shall be responsible for the unpaid premium, no recovery can be had against the assignee therefor.[36] But where the assignee promises to pay all future assessments, this is a new contract.[37]

§ 1253. Liability of Member—Generally.—The liability of members to assessment must depend upon the contract provisions,[38] and also upon such statutes as are applicable.[39] If the charter provides that a member shall be liable for losses in proportion to the amount of his premium note. he may be compelled to pay such part of all losses as his premium note bears to the whole amount of premium notes which are collectible and legally assessable, and not the whole amount of the notes irrespective of the fact whether they are collectible or not.[40] The liability to pay, however, may under the contract be optional with the member, in which case no action will lie against him for the amount of the assessment, for it is not then a debt; in such case he may of his own volition or negligence terminate the contract. But a member may so stipulate to pay assessments as that upon failure to fulfill

[34] Francis v. Butler Mut. F. Ins. Co., 7 R. I. 159. See secs. 1153, 1158, herein.

[35] Cummings v. Hildreth, 117 Mass. 309; Commonwealth v. Massachusetts Mut. Ins. Co., 112 Mass. 116; Brannim v. Mercer Co. Ins. Co., 28 N. J. 92; New Hampshire etc. Ins. Co. v. Hunt, 30 N. H. 219.

[36] Washington Ins. Co. v. Grant, 2 Pa. L. J. 308.

[37] Foster v. Equitable Mut. Ins. Co., 2 Gray (Mass.), 216.

[38] See sec. 848, herein. That charter and by-laws are part of contract, see sec. 188, herein.

[39] Commonwealth v. Massachusetts F. Ins. Co., 112 Mass. 116, per Wells, J. See, also, sec. 194, herein.

[40] Bangs v. Gray, 12 N. Y. (2 Kern.) 477.

such obligation an action will lie against him to recover the same.[41] If the liability to levy assessments is absolute, an investigation by trustees as to whether the deceased had ceased to be a member is not conclusive, and an assessment may be levied upon the death of a member to provide for death benefits. In a case on this point the right to such benefits depended upon the continuation of membership in a cotton exchange, and it was held that the fact that the share was hypothecated was not necessarily such a sale thereof as would terminate the membership;[42] and it is held that a party who accepts the policy cannot escape liability to an assessment on the ground that he is ignorant of its provisions.[43] But an assessment must be legally made, or it is not collectible.[44]

§ 1254. Nonpayment of Assessment Due after Date of Accident Insured against.—Where a member is insured in a benefit society against personal bodily injuries and against death resulting from such injuries within ninety days from the date of the accident, the liability of the company is fixed from the date of the accident, and the company will not be relieved from liability by reason of the fact that assured ceased to be a member on account of a failure to pay a certain assessment falling due after the date of the accident.[45]

§ 1255. Liability to Assessments—Agreement or Provisions Contrary to Statute.—It is held that where one insured in a mutual insurance company is liable under the

[41] McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87, per the court; Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913; In re Protection L. Ins. Co., 9 Biss. (U. S.) 188; State v. Monitor F. Assn., 42 Ohio St. 555; Planters' Ins. Co. v. Comfort, 50 Miss. 662; Ancient O. U. W. v. Moore (Ky.), 9 Ins. L. J. 539; Farmers' etc. Ins. Co. v. Chase, 56 N. H. 341.

[42] Dillingham v. New York Cotton Exch. (U. S. C. C. 1892), 49 Fed. Rep. 719.

[43] Morrisson v. Insurance Co., 69 Tex. 353. See sec. 1311 as to defenses.

[44] See secs. 1290-1297, herein.

[45] Burkheiser v. Mutual Acc. Assn., 10 U. S. C. C. A. 94; 61 Fed. Rep. 816; 26 L. R. Annot. 112.

statute of its incorporation to pay his proportion of such assessments as shall be sufficient to meet all of the company's losses and liabilities, he cannot limit such liability by any arrangements entered into with the company, nor can his liability be lessened by any provisions in the articles of association.[46] But in another case it is held that a general understanding among all the members should govern as to the extent of liability for assessments.[47]

§ 1256. Liability—Prior and Subsequent Losses—Liability after Loss, Forfeiture or Suspension.—As a general rule, a member is not, in the absence of a contract stipulation or by-laws to the contrary, liable for losses incurred prior to issuing his policy.[48] Yet the contract may be such that a member will be liable to assessments for losses accruing prior to his membership, or after suspension or forfeiture of the policy, or after loss;[49] so that a member may be liable for all lawful assessments upon his premium note for the full time of the policy, as well before as after loss.[50] So a party who is under the charter a member during the term specified in the policy may be liable to assessment during such term, even after a loss,[51] until the policy or certificate is surrendered,[52] and the provisions of the application and by-laws may be such that the company may elect to continue the membership even after default in payment of assessments or dues, and hold the member liable for assessments subsequently thereto and until notice of withdrawal of the member.[53] So

[46] Russell v. Berry, 51 Mich. 287.

[47] Macklure v. Bacon, 57 Mich. 334 (one judge dissenting).

[48] Capital City Mut. F. Ins. Co. v. Boggs, 172 Pa. St. 91; 33 Atl. Rep. 349; Fire Ins. Co. v. Hartshorne, 90 Pa. St. 465; Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; 59 N. W. Rep. 661.

[49] Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. St. 499; 20 Atl. Rep. 502. 505; Susquehanna Mut. F. Ins. Co. v. Stauffer, 125 Pa. St. 416; 17 Atl. Rep. 471, and cases following.

[50] Swamscot Machine Co. v. Partridge, 25 N. H. 369.

[51] Boot & Shoe Ins. Co. v. Melrose Soc., 117 Mass. 199; Philbrook v. New England Mut. Ins. Co., 37 Me. 137; New Hampshire Ins. Co. v. Rand, 24 N. H. 428.

[52] Thropp v. Susquehanna Mut. F. Ins. Co. (Pa. 1889), 17 Atl. Rep. 473. See, also, sec. 1260, herein.

[53] Baker v. New York State Mut. B. Assn., 27 N. Y. Week. Dig. 91.

the member may under the by-laws be liable for assessments for losses occurring prior to the issue of the policy.[54] But in the absence of some provision therefor in the contract, a mutual accident company cannot assess a member for losses arising prior to his membership.[55] So an assessment levied upon a premium note of a member of a mutual fire insurance company is voidable by him where such assessment is for losses incurred at a time when he was not a member of the company;[56] nor can money deposited by a member in advance to meet certain assessments be used by the company to pay such prior losses,[57] and a member may be liable for losses during suspension of the risk for nonpayment of assessments.[58] And it is held that the assured may be liable for assessments even after forfeiture for breach of conditions for losses accruing while the policy was in force, for he is liable to contribute to all losses while the policy is in force where the condition so stipulates,[59] and where the loss has occurred during membership, it has been held that the assessment may be levied even nine years after the policy has expired.[60] But it is decided that alienation avoids the contract, determines the mutuality, and ends the liability of the assured to assessments thereafter; as where the insured sold the insured property.[61] But a suspended member of an Odd Fellows' lodge is liable for all dues accruing after his suspension if the by-laws so provide, and the by-

[54] Susquehanna Mut. F. Ins. Co. v. Stauffer, 125 Pa. St. 416; 17 Atl. Rep. 471.

[55] Roswell v. Equitable Aid Union, 13 Fed. Rep. 840; Evarts v. United States Mut. Acc. Assn., 61 Hun. (N. Y.) 624; 40 N. Y. St. Rep. 848; 16 N. Y. Supp. 27; Insurance Co. v. Houghton, 6 Gray (Mass.), 77.

[56] Swing v. Akely Lumber Co. (Minn. 1895), 64 N. W. Rep. 97.

[57] Evarts v. United States Mut. Acc. Assn., 61 Hun (N. Y.), 624; 40 N. Y. St. Rep. 848; 16 N. Y. Supp. 27.

[58] Webb v. Mutual F. Ins. Co., 63 Md. 213.

[59] Smith v. Saratoga Mut. F. Ins. Co., 3 Hill (N. Y.), 508; Korn v. Mutual Assur. Soc., 6 Cranch (U. S.), 192; Scheufler v. Grand Lodge, 45 Minn. 256; 47 N. W. Rep. 799; Thropp v. Susquehanna Mut. F. Ins. Co. (Pa. 1889), 17 Atl. Rep. 473.

[60] Smith v. Bell, 107 Pa. St. 352.

[61] Wilson v. Trumbull Mut. F. Ins. Co., 19 Pa. St. 372; Wadsworth v. Davis, 13 Ohio St. 123; Boland v. Whitman, 33 Ind. 64.

laws be reasonable, and for the recovery of such dues an action lies.[62]

§ 1257. Members Joining between Loss and Rendition of Judgment against Company.—An assessment to satisfy a claim for loss under a judgment cannot be levied on members who have joined between the time of loss and the rendition of judgment where the by-laws only provide for assessments on members.[63]

§ 1258. When Dues Payable—Dues in Arrears—Forfeiture.—The time when dues become payable must depend necessarily upon the contract provisions, or, in cases where they are payable to a subordinate lodge, it may be left to such lodge to determine under its by-laws and regulations the times of payment. A payment in advance is, however, not necessary, unless the contract or by-laws so provide. Thus, the computation of time in determining whether a member is "six months" in arrears must be referred as to its commencement to the time the dues are payable, which, if they are payable quarterly, is at the end of each quarter, and a member is in arrears "six months" from that time, and not as soon as the "six months' dues" are owed,[64] and the last day of the term is excluded, the time within which the six months are to run commencing the following day.[65] So when dues payable quarterly are paid within two weeks after the end of that quarter on which they became due, the member is not in arrears "over the amount of thirteen weeks."[66] But the provisions made by a local lodge cannot supersede the constitution of the association and make the dues payable in advance, where the constitution provides that a certificate cannot be forfeited until the member is more than six months in arrears for the local lodge dues;[67]

[62] Palmetto Lodge v. Fleming, 2 Strob. (S. C.) 457; 49 Am. Dec. 604. But see Vivar v. Supreme Lodge K. of P. (N. J. 1890), 20 Atl. Rep. 36.

[63] Collins v. Bankers' Acc. Ins. Co. (Iowa, 1895), 64 N. W. Rep. 778.

[64] Bukofzer v. Grand Lodge (N. Y. S. C. 1891), 40 N. Y. St. Rep. 653; 15 N. Y. Supp. 922.

[65] Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.

[66] Strasser v. Staats, 59 Hun (N. Y.), 143; 35 N. Y. St. Rep. 789; 13 N. Y. Supp. 167.

[67] Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.

for in such case the dues are not demandable in advance at the beginning, but at the end, of the term for which they are liable, and the fact that members may, and most of them do, pay their dues in advance of the day fixed cannot affect the question.[68]

§ **1259. Assessment Falling Due on Sunday.**—If the last day of the month, that being the day on which the assessment becomes due, falls on Sunday, payment may be made on the following Monday in California, even though the assured dies on Monday.[69]

§ **1260. Assessments—Suspension of Member.**—A contract may be so expressly or impliedly conditioned that nonpayment of an assessment merely operates to suspend the protection afforded by the policy or certificate for such period as the assessment shall remain unpaid,[70] and if there be a loss during the suspension, the insurance cannot be recovered.[71] So under a provision that a policy shall be "null and void until the assessment be paid," nonpayment within the specified period for payment does not absolutely extinguish the contract, but merely suspends the obligation.[72] So a member entitled to sick benefits may be suspended for nonpayment of assessments notwithstanding the rules relating to such benefits provide for the payment of dues and fines, and that a member shall not be in arrears so as to preclude his right to benefits; it also appearing that the rules relating to the widows', etc., fund provided for such suspension for default in paying assessments.[73] But if there be no authority conferred so to do,

[68] Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.

[69] Northey v. Bankers' L. Assn. (Cal. 1895), 42 Pac. Rep. 1079.

[70] Blanchard v. Atlantic etc. Ins. Co., 33 N. H. 9; Joliffe v. Madison Ins. Co., 39 Wis. 111; 20 Am. Rep. 35; Lycoming F. Ins. Co. v. Rought, 97 Pa. St. 415; Washington etc. L. Ins. Co. v. Rosenberger, 84 Pa. St. 373.

[71] Blanchard v. Atlantic, 33 N. H. 9; Washington etc. L. Ins. Co. v. Rosenberger, 84 Pa. St. 373.

[72] Hummel's Appeal, 78 Pa. St. 320.

[73] Hansen v. Supreme Lodge K. of H., 140 Ill. 301; 29 N. E. Rep. 1121.

a vote to suspend for nonpayment of assessments is invalid,[74] and unless there is some provision for suspension, nonpayment of assessments will not so operate in mutual benefit societies.[75]

§ 1261. **When Nonpayment of Dues and Assessments Forfeits or Suspends.**—A failure or refusal to pay dues under an endowment certificate in a society doing an insurance business under the lodge system will operate to forfeit a member's certificate where it is so provided, although so long as a member pays his dues and remains in good standing his certificate cannot be forfeited by a forfeiture of the charter of his lodge declared by the general order, but if a minority of the members secede from a lodge and refuse to pay dues, their certificates are forfeited.[76] A stipulation or provision in the contract for forfeiture for nonpayment of dues at a specified day will operate of itself to work a forfeiture or suspension, as the case may be, if said dues are not paid as agreed.[77] So mutual benefit societies may provide that nonpayment of assessments within a specified time after notice shall operate of itself, without notice or declaration of forfeiture, or other act of the society, to work a forfeiture or suspension, and a provision of this character will be effective to accomplish the purpose intended; said construction will be given the contract where such appears clearly from its terms to have been the intent of the parties.[78] And the rule as to forfeiture for nonpayment of assessments within a specified time provided for in the charter of a mutual benefit society is self-operating.[79] So

[74] New England Mut. F. Ins. Co. v. Bretter, 34 Me. 451.

[75] Mutual B. L. Ins. Co. v. French, 30 Ohio St. 240; 27 Am. Rep. 443; Borgraefe v. Knights of Honor, 22 Mo. App. 127; District Grand Lodge v. Cohn, 20 Ill. 335.

[76] Goodwin v. Jedidjah Lodge, 67 Md. 117; 9 Atl. Rep. 13.

[77] Mandego v. Centennial Mut. L. Assn., 64 Iowa, 134.

[78] Hansen v. Supreme Lodge K. of H., 140 Ill. 301; 29 N. E. Rep. 1121; American Mut. Aid Soc. v. Quire, 8 Ky. L. Rep. 101; Benedict v. Grand Lodge A. O. U. W., 48 Minn. 471; 51 N. W. Rep. 371; 21 Ins. L. J. 438; McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87; Illinois Masons' B. Soc. v. Baldwin, 86 Ill. 479; Johnson v. Southern Mut. etc. Soc., 79 Ky. 404.

[79] Maginnis' Estate v. New Orleans etc. Mut. A. Assn., 43 La. Ann. 1136; 10 S. Rep. 180; 21 Ins. L. J. 171.

the failure to pay an assessment when due operates of itself to suspend a member, where it is provided in the by-laws that such act shall operate to forfeit all claims against the association, and that his name shall be erased from the roll.[80] And where the by-laws provide that neglect or refusal to pay an assessment for a specified period shall determine the membership, and the secretary shall strike the member's name from the roll, such laws are self-executing, and a defaulting member is not aided by the fact that the secretary does not strike his name from the roll.[81] So it is held that where an assessment may be made by a receiver, its nonpayment may operate as a forfeiture under a charter provision for forfeiture for nonpayment of assessments when due.[82] So nonpayment of an assessment duly levied within the time required will invalidate the certificate if due notice is given.[83] The general rule is, however, subject to such exceptions as may arise from statutory provisions, waiver, and estoppel. But if the note be a payment in advance of the premium, nonpayment of an assessment does not suspend the policy, notwithstanding a vote that if assessments on the premium notes are not paid punctually the policy will be suspended; such a vote, not being warranted by the charter, will be of no validity.[84] It is held that if no hour is specified as that of the termination of time of payment of an assessment, the policy will be in force until midnight of the last day specified in the notice as that on or before which the assessment must be paid to save a forfeiture. Thus, if an assessment is payable on or before the first day of May, midnight of May 1st will be held to have been intended.[85] It is held, however, that although the certificate expressly stipulates that it shall be void for nonpayment of assessments with-

[80] Yoe v. Mutual B. Assn., 63 Md. 86.

[81] Rood v. Railway Pass. etc. Mut. B. Assn., 31 Fed. Rep. 62. See Madeira v. Merchants' Exch. B. Soc., 16 Fed. Rep. 749.

[82] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 40 N. Y. St. Rep. 800; 16 N. Y. Supp. (N. Y. S. C. 1892); 43 N. Y. St. Rep. 204.

[83] Burdon v. Massachusetts Safety Fund Assn., 147 Mass. 360; 17 N. E. Rep. 874.

[84] New England Mut. Ins. Co. v. Butler, 34 Me. 451; Rix v. Mutual Ins. Co., 20 N. H. 198.

[85] Oeh v. Homestead etc. Ins. Co., 4 Pitts. Leg. Jour. 98.

in thirty days after notice, the forfeiture is optional with the society, and the certificate only voidable.[86]

§ **1262. Assessments Paid in Advance in Excess of Mortuary Assessments.**—A member of a mutual benefit association who has paid assessments in advance in excess of the amounts required to meet death claims is not obligated to pay assessments till the excess is equaled by unpaid assessments.[87] But although there are sufficient funds of the member in the society's hands or in some of its branches to meet an assessment, yet if his default is prejudicial to his relations with the association, it may be enforced against him.[88]

§ **1263. No Forfeiture—Assessments in Advance of Death Losses.**—A company is authorized to levy assessments upon policy-holders only for death losses that have actually occurred, it cannot claim a forfeiture of a policy for nonpayment of an assessment made in advance of a death loss.[89]

§ **1264. Forfeiture or Suspension—Whether Affirmative Act of Society Necessary.**—There is, as will be noticed by a comparison of the cases, a well-defined distinction between provisions of the character of those considered under preceding sections and other cases where the fundamental law of the order or society provides that for nonpayment of dues and other delinquencies the member may be suspended by the lodge or other judicatory; in the latter class of cases the designated authority must exercise the power to suspend, otherwise there can be no suspension, for the rules of the order must be looked to as the source of authority, and whatever rights are conferred thereby must be exercised only in conformity therewith, in so far as those rules are lawful. It is these rules on which the member has a right to rely, and by

[86] Bosworth v. Western M. A. Soc., 75 Iowa, 852; 39 N. W. Rep. 903. See Supple v. Iowa State Ins. Co., 58 Iowa, 29.

[87] Covenant Mut. B. Assn. v. Baldwin, 49 Ill. App. 203.

[88] McGowan v. Supreme Coun. Cath. M. B. Assn., 76 Hun (N. Y.), 534; 58 N. Y. St. Rep. 268.

[89] Schultz v. Citizens' Mut. L. Ins. Co., 59 Minn. 308; 61 N. W. Rep. 331.

which he is bound, but in cases of the former class it is not necessary for the lodge or society or any other judicatory of the order to adjudge a forfeiture against a delinquent member for nonpayment of an assessment for a death benefit. The provisions for forfeiture or suspension for nonpayment of assessments within a specified time, whether contained in the charter or articles of association, are valid and binding, and the forfeiture or suspension attaches by operation of the law, and this rule applies equally to the valid and reasonable by-laws of the society, or to the by-laws and regulations of a subordinate lodge when such lodge is empowered to enact them, and they are reasonable.[90] The second class of decisions includes those cases where the constitution and by-laws of a mutual benefit society provide that a member shall be excluded from the benefits of the lodge during default in the payment of dues, and after the default has continued for a specified time, the member may be suspended. In such cases there must be an actual expulsion or suspension, for the fact of nonpayment does not of itself terminate the member's rights.[91] So although the constitution provides that members of lodges in default for nonpayment of benefit assessments within a given time shall forfeit all claim to the funds, yet if a special mode of procedure as to such defaulting lodges is also provided, such default does not ipso facto operate as a forfeiture of the member's rights.[92] So in case the by-laws provide that any member of the lodge failing to pay his assessment within a specified time "shall be suspended," there must be some affirmative act of the lodge.[93] Again, nonpayment of dues does not ipso facto work a forfeiture of membership benefits where a formal method of suspension is provided under the

[90] See Borgraefe v. Knights of Honor, 22 Mo. App. 127, opinion of Thompson, J.

[91] Scheuffer v. Grand Lodge, 45 Minn. 256; 47 N. W. Rep. 799; 20 Ins. L. J. 241.

[92] Young v. Grand L. S. of P., 173 Pa. St. 302; 33 Atl. Rep. 1038.

[93] Schen v. Grand Lodge etc. Independent Foresters, 17 Fed. Rep. 214. See Commonwealth v. Pennsylvania B. Inst., 2 Serg. & R. (Pa.) 141; District Grand Lodge v. Cohn, 20 Bradw. (Ill.) 335. See Lazinsky v. Supreme Lodge K. of H., 31 Fed. Rep. 592; Columbia Ins. Co. v. Buckley, 83 Pa. St. 292.

by-laws, even though the member, being secretary of the society, has failed to report his own delinquencies, and therefore no formal proceedings for suspension are had;[94] and where the charter provides that if a member is suspended by the secretary, appeal may be made to the board of directors, when in session, it is held that such forfeiture cannot properly be imposed as an ex parte result of mere default in payment, and without giving the assured an opportunity for hearing.[95] There is another class of cases where the contract provides that notice of assessments shall be given to the member. Here the notice must be given as provided for, or there can be no forfeiture or suspension for default.[96] A provision in the constitution is not self-executory which provides for a prompt remittance of the amount of the assessment upon notice, and that upon failure to remit within a specified time the member shall forfeit his claim to membership; some action must be taken by the directors as to forfeiture.[97]

§ 1265. When Member is in Good Standing—When not. The term "good standing" is one frequently used in the certificates issued by mutual benefit societies. The term, while a general one of wide application, may also have reference to the nonpayment of dues and assessments, and a member is not in good standing at the time of his death, so as to warrant a recovery on his certificate, where he has not complied with the society's laws in relation to dues and assessments, and is then in default, and the time has fully expired within which they might be paid;[98] and where it appears upon trial of an action

[94] Osterman v. District Grand L. No. 4 I. O. B. P. (Cal. 1896), 43 Pac. Rep. 412.

[95] Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200.

[96] Supreme Lodge Knights of Honor v. Dalberg, 138 Ill. 508; 28 N. E. Rep. 785; Pulford v. Fire Department etc. Co., 31 Mich. 458; Watchel v. Widows & Orphans' Soc., 84 N. Y. 28; Payne v. Mutual Relief Soc., 17 Abb. N. C. (N. Y.) 53; 6 N. Y. St. Rep. 366; Hall v. Supreme Lodge, 24 Fed. Rep. 450. See. also, c. xxxiii, herein, as to notice. See Lazinsky v. Supreme Lodge K. of H., 31 Fed. Rep. 592, as to record of suspension in society's books not being evidence of suspension.

[97] Northwestern Traveling Men's Assn. v. Schauss, 148 Ill. 304; 51 Ill. App. 78; 35 N. E. Rep. 747.

[98] McMurry v. Supreme Lodge K. of H., 20 Fed. Rep. 107.

to recover upon a benefit certificate that the assessment was regularly and properly levied, and was valid, and the member fails to pay the same, no recovery can be had on the ground that the member was not in good standing at his decease.[99] But if the company has waived the forfeiture by subsequently levying assessments and recovering prior assessments, the question of good standing becomes immaterial in the action upon the certificate of a deceased member;[100] although if the officers to whom the assessments so made were paid after suspension of the member, and he is not restored, the company may nevertheless deny the member's good standing.[101] If a member neglects to renew a deposit of the amount necessary to meet his assessments upon notification thereof as required by the contract, he forfeits his good standing, and no recovery can be had upon his certificate.[102] But the suspension must be regularly made; thus, if the quarterly dues are payable "on or before the first meeting in each quarter," it must appear that a meeting has been held since the commencement of the quarter; the fact that the association holds a weekly meeting is not enough where it is attempted to deny a member's good standing for nonpayment of dues for a certain quarter.[103] In the construction of contracts providing for "good standing," consideration should be had in all cases to the decisions under similar contracts in other cases where the provisions for forfeiture or suspension for nonpayment of dues or assessments exist, and in view of such decisions the ruling in some of the cases under this section will be found questionable, or at least inconsistent therewith.

§ 1266. Nonpayment of Assessments—When no Forfeitures.—No forfeitures or suspensions occurs in mutual benefit societies or companies for nonpayment of an assessment

[99] Passenger Conductor's L. Ins. Co. v. Birnbaum, 116 Pa. St. 565; 11 Atl. Rep. 378.

[100] Millard v. Supreme Coun. American Legion of Honor, 81 Cal. 340; 22 Pac. Rep. 864. See c. xxxiv, herein.

[101] Lyon v. Supreme Assembly R. S. of G. F., 153 Mass. 83; 26 N. E. Rep. 236.

[102] Zeigler v. Mutual Aid & Ben. L. Ins. Co., 1 McGl. (La.) 284.

[103] Mills v. Rebstock, 29 Minn. 380.

when due unless so provided.[104] Where money deposited to meet all future assessments is wrongfully applied on assessments made prior to membership, the member will not be in default for nonpayment of assessments to which the said money should have been applied.[105] But an assessment must be legally made; that is, in the manner and for the purposes specified by the officers designated, otherwise there can be no forfeiture.[106] If an assessment falls due after the loss of the property insured, its nonpayment will not operate as a forfeiture with reference to that loss, even though the policy provides that neglect for thirty days to pay an assessment after notice thereof shall avoid the contract.[107] Nor can a foreiture for nonpayment of assessments be declared after death to destroy rights under a certificate in force at the time of death.[108] In an Illinois case a new society became successor of another, and issued new certificates upon surrender of the old ones under a resolution therefor, which also provided that assessments made by the old society not due at the time of transfer of membership should become due and payable to the new society the same as it would have been to the old one had there been no transfer. The new certificate of a member thus transferred provided for the payment of a specified sum and forfeiture for nonpayment of assessments "made by the society," and it was held that this covered only assessments made by the new society, and the member's certificate was not forfeited for nonpayment of an assessment made by the old society.[109] Again, if the obligation to pay an assessment arises from an independent contract, its violation does not affect the member's rights under his certificate. The forfeiture or suspension must be provided for as a part of the contract to be of force.[110]

[104] Mutual B. L. Ins. Co. v. French, 30 Ohio St. 240.

[105] Evarts v. United States Mut. Acc. Assn., 40 N. Y. St. Rep. 878; 16 N. Y. Supp. 27; 61 Hun (N. Y.), 624.

[106] Roswell v. Equitable Aid Unions, 13 Fed. Rep. 840; Agnew v. A. O. U. W., 17 Mo. App. 254. See secs. 1290-1302, herein.

[107] Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67; 41 N. W. Rep. 443.

[108] Baker v. Citizens' Mut. etc. Co., 51 Mich. 243.

[109] Mutual L. & A. Soc. v. Miller, 23 Ill. App. 34.

[110] Sanford v. California Farmers' etc. Ins. Co., 63 Cal. 547.

§ 1267. Assessments by Unauthorized Company.—Where the statute of a state provides that no foreign company shall, "directly or indirectly, take risks or transact any business of insurance" in such state, a contract of insurance by a foreign company upon property in such state is held to necessarily involve the doing of business within that state, and therefore it is also held that a policy-holder in such a case is not liable for assessments, though the contract was executed outside the state.[111]

§ 1268. Liability to Assessments—Cancellation—Surrender—Withdrawal.—An insurance by a mutual company may be canceled by agreement of the parties, and the insured is not liable to assessment on his premium notes for subsequently contracted indebtedness, nor for unpaid assessments made prior thereto;[112] but the agreement to cancel must be executed to have such effect.[113] And it is held that upon withdrawal by a member he cannot be held liable to pay assessments thereafter, although he cannot thereby avoid obligations already incurred.[114] Where the amount of all the assured's liabilities were more than fully paid at the time of the cancellation of his policy, it was held that his insurance having been terminated by the cancellation he was not liable for losses subsequently accruing.[115] There are, however, decisions which are seemingly in conflict with the doctrine of the above cases, and which hold that a liability to assessment may still exist, notwithstanding cancellation and surrender or in-

[111] So held in Rose v. Kimberly & Clark Co., 89 Wis. 545; 62 N. W. Rep. 526; 40 Cent. L. J. 355; 27 L. R. Annot. 556; Seamans v. Temple Co. (Mich. 1895), 63 N. W. Rep. 408; 28 L. R. Annot. 430. See secs. 1216, 1275, herein.

[112] York Co. Ins. Co. v. Turner, 53 Me. 225; Akers v. Hite, 94 Pa. St. 394; 39 Am. Rep. 792; Columbia Ins. Co. v. Buckley, 83 Pa. 293; Campbell v. Adams, 38 Barb. 132; Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913, noted below.

[113] Columbia Ins. Co. v. Stone, 3 Allen (Mass.), 385.

[114] Union Mut. F. Ins. Co. v. Spaulding, 61 Mich. 77; 27 N. W. Rep. 860; Borgraefe v. Knights of Honor, 26 Mo. App. 618. See Baker v. New York State Mut. B. Assn., 27 N. Y. Week. Dig. 91.

[115] Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913.

solvency.[116] But if there has been an executed agreement to cancel, and an adjustment or settlement, and there is no fraud or other ground of relief from such agreement, and the agreement is one which the company or society might lawfully make, it is difficult to see how membership or liability will continue.[117] Again, a change in a company's charter may be of such a radical character as to discharge previous subscribers who do not assent to the change from liability to pay future assessments on their stock.[118]

§ 1269. Right of Member to Withdraw and Avoid Liability for Assessments.—A policy holder in a mutual fire company cannot be permitted to withdraw therefrom and be released from all liability for losses.[119] And although a member of a mutual company is at liberty to surrender his policy and withdraw, subject to a liability for his proportion of all assessments "to which the company is liable at the time of his withdrawal," this privilege does not enable him by withdrawal to avoid liability for assessments to cover his proportion of losses for previous years, for losses in litigation, for which the company was liable at the time of his withdrawal, but which have not been assessed.[120]

§ 1270. Whether Contract to Pay Assessments Unilateral.—If under the contract the member is to be liable during his membership for assessments duly made by the society's officers upon the deaths of other members, subject to forfeiture for nonpayment of said assessments within a limited time, he is liable during his membership for assessments regularly made upon the death of other members; the stipulation

[116] Commonwealth v. Massachusetts Mut. Ins. Co., 112 Mass. 116. In this case neither insolvency nor cancellation were held to relieve from liability for losses accrued while members: Commonwealth v. Mechanics' Mut. Ins. Co., 112 Mass. 192. See, also, secs. 1231, 1232, herein.

[117] See cases under first note in this section.

[118] Ashton v. Burbank, 2 Dill. (C. C.) 435.

[119] Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; 59 N. W. Rep. 661.

[120] Ionia E. & B. Farmers' etc. Ins. Co. v. Otto, 96 Mich. 558; 22 Ins. L. J. 857; 56 N. W. Rep. 88; 56 N. W. Rep. 755; 97 Mich. 522.

for forfeiture cuts off the possibility of future obligation, but does not discharge the members from past society debts or dues, and the contract is not unilateral.[121]

[121] Ellerbe v. Barney, 119 Mo. 632; 23 Ins. L. J. 356; 25 S. W. Rep. 384. In this case the court, per Martin, special judge, says: "The defendant paid assessments until those now in dispute were called. The latter were regularly made by the proper officers of the society to pay the amounts due upon the deaths of members in good standing holding valid certificates. Defendant was duly notified of these assessments. Afterward the insurance commissioner, now plaintiff, took possession of the assets of the concern under the laws of Missouri, because of the insolvency of the company, and now seeks to compel payment of these assessments as assets for the benefit of those properly entitled to share therein. . . . . On the part of the appellant it is contended that he never became indebted for the assessment levied against him, but that he had the option of forfeiting his rights under the certificate by declining to pay them. . . . . In his contention the appellant argues that the certificate held by him constituted a contract of life insurance. . . . . That being a contract of life insurance it must necessarily possess the distinguishing features imputed to such a contract by the courts in being a unilateral or one-sided undertaking of the assured as to all future payments required of him. If he chooses to pay them, the company is bound to continue the insurance. If he declines to make further payments, the insurance ends without imposing on him any liability on account of them. . . . . The certificate in controversy differs materially from the premium paying policies of the old capital stock companies. It is the undertaking of a corporation organized on an entirely different basis. The Masonic mutual benefit society of Missouri belongs to that class of life insurance companies known among insurance men by the name of 'fraternal beneficiary associations.' . . . . It is manifest that these assessments in their nature bear a near resemblance to the dues incident to membership in a friendly society, and constitute a consideration for the promised insurance of the association materially differing from the annual premium stock companies. When considered in the light of society dues, it will be admitted that a person cannot, by discontinuing his membership, escape the obligation of paying those dues which accrued before the termination of his membership." The court then considers certain portions of the certificate and by-laws, and adds: "There is nothing whatever in this language, providing as it does for the forfeiture of membership and discontinuance of the rights incident to it, which suggests or intimates a discharge from past society debts and dues. In the first section of the article the assessment is expressly declared to be binding as a demand which the members must pay. In the second section he forfeits his membership and rights by failure to pay after a notice of twenty days. A condition of forfeiture of rights is a well-known feature added to many contracts which does not in itself discharge the obligations which have already accrued under it. . . . .

§ 1271. Right to Deny Liability for Losses on Policies to Nonmembers.—The fact that regular members of a mutual insurance company have received the benefits of their insurance does not estop them to deny their liability to assessments for losses on policies issued to nonmembers.[122]

§ 1272. Dues and Assessments—Effect of Insolvency upon Liability.[123]—The neglect to pay the monthly dues after a safety fund association stops business and pending its dissolution, does not forfeit the policy, but it is otherwise as to the nonpayment of assessments duly made prior to the filing of the bill for dissolution, at least so as to preclude the right to share in the safety fund.[124] In determining this question, consideration must always be given to the fact whether the member is liable at all events under his contract, or whether it is optional with the member to pay or not as he chooses, subject only to forfeiture if he does not.[125] If the charter provides that the member shall be liable to the amount of the note given in case the losses exceed the funds on hand, insolvency does not destroy the obligation to contribute to the specified amount.[126] So

The natural effect of the forfeiture is to cut off the possibility of future obligations, but not to disturb the validity of past indebtedness. Something very positive would have to appear either in the express declaration of the contract, or as a necessary implication from its nature to give it a different effect. No such declaration appears, and I have endeavored to show that precisely the contrary is implied in the very nature and purpose of the contract in question. . . . . I do not regard this contract unilateral in the sense of relieving the assured from liability for insurance carried and consideration earned. No unilateral contract has ever been permitted to accomplish such an unjust result." Black, C. J., and Brace and Burgess, JJ., dissenting.

[122] Corey v. Sherman (Iowa, 1894), 60 N. W. Rep. 232.

[123] See, also, secs. 1231, 1232, herein.

[124] Burdon v. Massachusetts Safety Fund Assn., 147 Mass. 360; 6 New Eng. Rep. 840.

[125] See In re Protection L. Ins. Co., 9 Biss. (C. C.) 188; Mackless v. Bacon, 57 Mich. 334.

[126] Vanatta v. New Jersey Mut. L. Ins. Co., 31 N. J. Eq. 15. As to the power of the court in a proceeding for the winding up of a safety fund association to order the levying of a death assessment, see Burdon v. Massachusetts Safety Fund Assn., 147 Mass. 360; 6 New Eng. Rep. 840.

when losses have absorbed the entire funds of the company, a member may be liable to assessment to the full amount authorized by the unexpired contract of insurance.[127] So premium notes of members of a mutual company may be liable to assessments after insolvency to pay unearned premiums due to one to whom it had issued a policy for an all cash premium for simple insurance, under a statute authorizing it so to do.[128] Nor after insolvency, but before declaration thereof, can a member make a binding agreement with the company whereby his liability to assessments is determined by cancellation of his policy.[129] So the insolvency of the insurers before the expiration of the policy is no defense to an assessment.[130]

§ **1273. Assessments—Receiver.**—The same consideration is involved in the determination of this question as is noted at the beginning of the last section, viz., whether payment by the member is optional or not. If a statute confers upon a receiver a right to sue for assessments due from members, he may maintain such suit and recover costs if successful.[131] If the statute only authorizes receivers to assess the members and persons insured, they cannot assess those whose policies have been surrendered and canceled for amounts claimed subsequently thereto.[132] The authority of a receiver to make an assessment where he is so entitled depends upon the existence of the necessary facts, and not upon the order of the court;[133] and if he fails to comply with the requirements of the by-laws respecting publication and notice of such assessments, they are invalid.[134] But an assessment by a receiver which does not include notes illegally surrendered to the makers does not

[127] Commonwealth v. Massachusetts Mut. F. Ins. Co., 112 Mass. 116.

[128] In re Minneapolis Mut. F. Ins. Co., Powell v. Wyman, 49 Minn. 291; 51 N. W. Rep. 921.

[129] Doane v. Millville Mut. Ins. Co., 43 N. J. Eq. 522.

[130] Sterling v. Merchants' Ins. Co., 32 Pa. St. 75; 72 Am. Dec. 773.

[131] Bacon v. Clyne, 70 Mich. 183; 14 N. W. Rep. 465, under Howell's Mich. Stats., sec. 4263.

[132] Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913.

[133] Thomas v. Whallon, 31 Barb. (N. Y.) 172.

[134] Sands v. Sanders, 26 N. Y. 239.

invalidate it where he has assessed all the premium notes in his hands.[135] So in an action for assessments he must allege and prove the necessary facts to entitle him to recover,[136] and if the complaint shows upon its face that neither the receiver nor the court had examined nor passed upon the validity of the claims against the company, there can be no recovery.[137] If the order appointing a receiver has not been appealed from, his right to make an assessment cannot be questioned.[138] It is not necessary, in an action by the receiver, to show all the facts upon which the claims for losses were allowed, and for which the assessments on the premium notes were made. It is only requisite that sufficient claims for losses have been allowed to make up the sum assessed. The fact that claims have been allowed prima facie binds the members.[139] So the statute may provide that the assessment shall be prima facie evidence of its regularity and of the receiver's right to recover.[140] It is held in New York that a receiver may, under authority of the court, order an assessment where there are proceedings for the voluntary dissolution of a benefit association.[141] But it is also held in the same state that the circumstances may be such that no absolute duty rests upon the members to pay an assessment ordered by the court to meet death losses, and that the nonpayment of such assessment does not deprive the members of a right to share in the reserve fund which under the decision was not liable for death claims, but

[135] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771. See secs. 1290-1302, herein, as to validity of assessments.

[136] Thomas v. Whallon, 31 Barb. (N. Y.) 172; Manlove v. Burget, 38 Ind. 211; Downs v. Hammond, 47 Ind. 131.

[137] In this case it was held that the amount of indebtedness previously allowed by the directors, and also of the valid claims against the company, must be ascertained prior to making an assessment, and that the averments must show the time covered by the policy, and that the losses occurred during that period: Embree v. Studder, 36 Ind. 423.

[138] Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490; 63 N. W. Rep. 1059.

[139] Sands v. Hill, 42 Barb. (N. Y.) 651.

[140] Bacon v. Clyne, 70 Mich. 183; 38 N. Y. 207; under How. Mich. Stat., sec. 4263.

[141] In re Equitable Reserve Fund L. Assn., 40 N. Y. St. Rep. 800; 16 N. Y. Supp. 80.

only a fund for the assistance of living members; although it was held that the expenses of winding up should be borne pro rata by both the "death fund" and "reserve fund."[142] The levy of an assessment by the assignee of a corporation not in bankruptcy is invalid,[143] and it is held that if the authority to make assessments is conferred solely upon the directors, courts cannot order an assessment.[144] When a premium note in advance for the security of dealers is given for a mutual insurance company, in accordance with the provisions of its charter at its commencement in business, and is renewed, the makers are equally liable, in case of insolvency, to the receivers, as if the occasion for its use had arisen during the existence of the first note;[145] and trustees for winding up the company's affairs may recover assessments on a policy containing a contingent liability clause, although the policies were canceled and the unearned premiums returned.[146]

§ 1274. What Receiver may Include in Assessment—Premium Notes.—Where premium notes are given to a mutual insurance company, it is held that the receiver may, where the company has become insolvent, include in an assessment upon such notes claims, shrinkage, interest on loss, and the expenses of the receivership.[147] In case of the insolvency of a mutual

[142] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 43 N. Y. St. Rep. 204; 21 Ins. L. J. 385; 30 N. E. Rep. 114, modifying the last case. See, also, In re Protection L. Ins. Co., 9 Biss. (C. C.) 188. See as to right of receiver to assess as opposed to understanding among members to the contrary, Mackleur v. Bacon, 57 Mich. 334 (one judge dissenting).

[143] Hurlburt v. Carter, 21 Barb. (N. Y.) 221.

[144] Hill v. Merchants' etc. Ins. Co., 28 Grant Ch. (U. C.) 560.

[145] Howard v. Hinckley etc. Iron Co., 64 Me. 93.

[146] Mansfield et al. Trustees v. Cincinnati Ice Co. (Ohio C. P. C. 1892), 28 Week. L. Bull. 113. See Maine Mut. M. Ins. Co. v. Pickering, 66 Me. 130. The New York statute provides for the cancellation and discharge of an insurance contract by the receiver, with the consent of the other parties holding such engagement (2 N. Y. Rev. Stats., sec. 75; Jones on Business Corporation Laws, p. 267), and also for the cancellation of policies in fire companies by the receiver, and for the issue of certificates of indebtedness: Gen. Laws N. Y. 1892, c. 38, art. 3, sec. 123; Hamilton's Stats. Rev. L. N. Y. 1892, p. 60.

[147] Davis v. Shearer, 90 Wis. 250; 62 N. W. Rep. 1050; Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490; 63 N. W. Rep. 1059.

fire insurance company, if an order is made by the court appointing a receiver, all existing policies are canceled from the date of the order, and no assessments can be made for premiums unearned at the time of the insolvency.[148]

§ 1275. Assessments by Trustee of Unauthorized Company.—Where a mutual fire insurance company not qualified to do business in a state because of noncompliance with the statutory requirement of such state becomes insolvent, and a trustee is appointed, an assessment by such trustee upon the makers of the premium notes within that state of the full amount due on their notes is void, where such assessment was never affirmed by the court, and the insured had surrendered their policies before the appointment of a trustee.[149]

§ 1276. Restoration to Membership—Reinstatement—Revival.—Where by the terms of the contract the nonpayment of dues or assessments operates as a suspension, or deprives the member of his good standing, he may be restored to his rights under the policy or certificate, or may be reinstated upon compliance with the terms of his policy or certificate, and the provisions of the society or order, and such laws will be liberally construed. In mutual benefit societies, where the result of a default is a forfeiture of the policy, and the laws of the society do not specify the conditions upon which reinstatement may be had, there would seem to be no doubt but that the society may, so far as empowered by its laws, impose such conditions for revival of the policy or reinstatement as are reasonable. The exercise of such a power is consistent with the purposes and conduct of the organization and the rights of other members. To hold otherwise would, in effect, deprive other members of that protection to which their contract with the society or company entitles them. Such a rule is based upon the reason and justice of the law, and is not inconsistent with the adjudicated cases, and must, therefore, when not so expressly provided by the terms of the contract,

[148] Davis v. Shearer (Wis. 1895). 90 Wis. 250; 62 N. W. Rep. 1050.

[149] So held in Swing v. Akely etc. Co. (Minn. 1895). 64 N. W. Rep. 97.

be considered as an implied condition of which every member will be deemed to have notice when he enters into contract relations with such society. But where the rules of the order provide that the member may be reinstated for valid reasons upon paying assessment arrearages, the society is not the sole arbiter as to the validity of the reasons, but the question is one for the jury.[150] If payment of all dues within a specified time after forfeiture is all that is required by the by-laws, usage of the society does not impose other obligations as prerequisites, for the positive terms of the contract will exclude the custom.[151] And where the member after his suspension pays an assessment, and the same is accepted, his rights under the policy revive, and the company will be liable for a subsequently occurring loss.[152] Again, if a by-law provides for reinstatement upon presenting sufficient excuse for failure to pay an assessment, and it appears that a director to whom the assessment had been paid had neglected to pay it over to the company, and the board refuses to reinstate upon said excuse on the ground of the member's ill-health, the case is a proper one for a court of equity.[153] A question sometimes arises as to the effect upon a member, who has been restored or readmitted to membership, of the failure of a local branch of a society to strictly conform to its constitution and by-laws as

[150] Dermis v. Massachusetts Mut. B. Assn., 47 Hun (N. Y.), 338 (one judge dissenting). In this case the member was rendered powerless by a sudden calamity before the expiration of the thirty days within which payment might under the contract be made. The member had paid many previous assessments, which fact the court declared manifested his intent to pay. After the member became unconscious, the company sent him a notification of the forfeiture, and that the certificate might be renewed if he was in good health, but the court said that the company had no right to add this condition to the rule, as it was not included therein, for if the reason was valid, it was not dependent upon the member's good health.

[151] Manson v. Grand Lodge, 30 Minn. 509.

[152] Washington etc. L. Ins. Co. v. Rosenberger, 84 Pa. St. 373; Modern Woodmen of America v. Jameson, 48 Kan. 718; 30 Pac. Rep. 460; reviewing 29 Pac. Rep. 473; Odd Fellows' Mut. Aid Assn. v. Sweetser, 117 Ind. 97; 19 N. E. Rep. 722.

[153] Van Houten v. Pine, 38 N. J. Eq. 72. That equity has jurisdiction, see Graveson v. Cincinnati L. Assn., 8 Ohio (C. C.), 171; 26 Week. L. Bull. 183.

to the routine prescribed in cases of members, and it would seem that to require too strict a compliance in matters not material, and which are merely formal and incidental to the exercise of the power, might, in many cases, be productive of great injustice, and it has been held that although the proceedings do not in all respects conform strictly to the rules of the order, the company is estopped to deny the member's good standing.[154] The fact that the member neglects to be reinstated during his lifetime does not prevent his insurance being revived after his death by payment of the sum due at his death, provided that the period has not elapsed within which he might, if living, be reinstated.[155] If the insured is reinstated on the payment of back dues, conditioned that he is of "temperate habits, in good health then, and for twelve months past, and free from all disease, infirmity, or weakness," a slight and temporary illness within the year previous to his reinstatement which does not render him uninsurable, and from which he has entirely recovered at the time of his reinstatement, does not violate such condition nor vitiate his insurance.[156] And in case of a requirement that the assured be alive and in good health to warrant a reinstatement, and the holder of the policy, after the assured's neglect to pay, applies within a reasonable time for reinstatement and offers to show that the assured is alive and in good health, the refusal to reinstate is a breach of contract by the company, and an action lies to recover the amount paid with interest.[157] But if satisfactory evidence of good health is required, and it cannot be furnished, the society need not reinstate.[158] If a benefit certificate is

[154] Gaige v. Grand Lodge, 48 Hun (N. Y.), 137; 15 N. Y. St. Rep. 455; Hoffman v. Supreme Council of American Legion of Honor, 35 Fed. Rep. 252.

[155] Modern Woodmen of America v. Jameson, 49 Kan. 677; 31 Pac. Rep. 733; reversing 30 Pac. Rep. 460, and 29 Pac. Rep. 473. See Wright v. Supreme Commandery etc., 87 Ga. 426; 13 S. E. Rep. 564.

[156] French v. Mutual Res. F. L. Assn., 111 N. C. 391; 32 Am. St. Rep. 803. See note to 3 Am. St. Rep. 634.

[157] Lovick v. Provident L. Assn., 110 N. C. 93; 14 S. E. Rep. 506; 21 Ins. L. J. 332.

[158] Ronald v. Mutual Res. F. L. Assn. (N. Y. C. A. 1892), 44 N. Y. St. Rep. 407; 21 Ins. L. J. 634.

forfeited prior to the enactment of a statute, the member's reinstatement after the act goes into effect does not bring the certificate within the provisions of the act, so as to affect the right of a beneficiary, by reason of the fact that he is not included within those beneficiaries whom the statute designates as the only persons in whose favor certificates in such societies can be issued.[159] It is held that a literal performance of the exact conditions is requisite to warrant a reinstatment. Thus, if the laws of the society require an appearance in person or an application in writing, and the payment of back dues and assessments, this must be done.[160]

§ **1277. Reinstatement by way of Waiver and not as New Contract—Creditor's Rights.**—A creditor who is a beneficiary is not entitled to recover upon a certificate, where the member is reinstated upon the payment of overdue assessments, if the evidence tends to show that the reinstatement is by way of waiver of the forfeiture and not by way of a new contract.[161]

§ **1278. To Whom Dues and Assessments are Payable.** In determining to whom dues may be paid, the question may depend upon the nature of the organization and its powers; or the character of the benefit to be derived, whether mortuary or sick benefits; or the contract, with all that is included as a part thereof; or the powers vested in local or subordinate lodges, if the society transacts its business under that system; or the effect of customs of the society or local order, if there be such order; or upon agency and waiver or estoppel.[162] Sometimes the rules of the organization may require the subordinate secretaries to collect an assessment,[163] or the

[159] Lindsey v. Western Mut. Aid Soc., 84 Iowa, 734; 50 N. W. Rep. 29, under Laws 21st Gen. Assem. Iowa, c. 65, sec. 21.

[160] Lehman v. I. O. B'nai B'rith, 23 N. Y. Week. Dig. 409.

[161] So held in Clarke v. Schwarzenberg, 164 Mass. 347; 41 N. E. Rep. 655, before Stat. 1885, c. 183.

[162] Examine secs. 35, 36, 398, 407, herein.

[163] So in Demings v. Supreme Lodge, 131 N. Y. 522; 30 N. E. Rep. 572.

assessment may be collected by the subordinate lodges and forwarded to the supreme lodge,[164] or it may be payable to the secretary or an officer of the society under the contract or rules of the organization.[165] So the dues may be payable to the local collector,[166] or the requirement may be that the member shall pay the assessment into the beneficiary fund in his subordinate lodge,[167] and it may be a question for the jury whether the promise of payment to a director, and his promise to pay the society and neglect so to do, constitutes a sufficient excuse to warrant a reinstatement.[168] So payment may be made to any officer who is empowered to recover the same.[169] The payment to a local lodge of assessments on a benefit certificate payable after death is payment to the supreme lodge where the member is admitted by the local lodge, which has collected the admission fee, and all assessments due from him, and the member's rights are not affected by the fact that the local lodge has failed to remit the same to the supreme lodge.[170] If an assessment is made by the subordinate lodge empowered to levy such an assessment, payment need not be made of an assessment levied by the grand lodge.[171] The stipulations of the contract as to the person to whom payments of an assessment shall be made cannot be set aside by a custom sanctioned by the officers of the lodge, and which has arisen from a construction of the contract by such officials. The members are bound only by the contract,[172] and from the terms of the contract the member may be obligated to see that

[164] So in Hall v. Supreme Lodge, 24 Fed. Rep. 450; Supreme Lodge v. Abbot, 82 Ind. 1; Scheu v. Grand Lodge etc., 17 Fed. Rep. 214.

[165] So in McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87; Manson v. Grand Lodge, 30 Minn. 509; 16 N. W. Rep. 395.

[166] So in Brown v. Grand Council, 81 Iowa, 400; 46 N. W. Rep. 1086.

[167] So provided in the constitution of the A. O. U. W.: A. O. U. W. v. Moore (Ky.), 1 Ky. L. Rep. 93.

[168] Van Houten v. Pine, 38 N. J. Eq. 72.

[169] Manson v. Grand Lodge, 30 Minn. 509; 16 N. W. Rep. 395.

[170] Barbaro v. Occidental Grove etc., 4 Mo. App. 429; Schmuck v. Gegenseitiger etc., 44 Wis. 369.

[171] Agnew v. A. O. U. W., 17 Mo. App. 254.

[172] Wiggin v. Knights of Pythias, 31 Fed. Rep. 122; Manson v. Grand Lodge, 30 Minn. 509.

the money for assessments and dues is actually received by the society.[173] So it may be necessary to pay assessments to a receiver of the company.[174]

§ **1279. Mode of Remittance.**—If there is no provision as to the mode of transmission of assessments or dues, or if the notice for the payment thereof is silent as to the mode of remitting the same, the assured will be bound to see that the money is actually received by the company within the time specified as that within which payment must be made, or he will forfeit his policy, for a party will be held strictly to his contract with regard to payment of dues. But if the notice gives instructions as to the mode of remittance, the right to forfeit the policy for nonpayment is waived, provided the insured complies with such directions;[175] and there are other exceptions to the rule.[176] If a member fails to pay his assessment on the day it becomes due, and the by-laws provide that the certificate shall be of no force in such case, and can only be revived by payment thereof, but that no indemnity benefits shall be paid for injuries received between the time when the delinquent payment became due and the time when the same is received by the secretary at his office, such member cannot recover benefits unless such money is received by the association before the member is injured, even though the check for the amount due is mailed in time to have ordinarily reached the association before the time of the injury, there being other evidence tending to show that it was not received till after the day of the injury.[177]

§ **1280. Tender of Assessments—Frequency of Tender.** If an expelled member regularly tenders his assessments until death, and the judgment is reversed or the reinstatement or-

[173] Protection L. Ins. Co. v. Foote, 79 Ill. 361. See chap. xxxiv, herein.

[174] See sec. 1273, herein.

[175] Protection L. Ins. Co. v. Foote, 79 Ill. 361.

[176] See secs. 1163, 1164, herein, as to the rule concerning premiums, and c. xxxiv, herein, as to waiver and estoppel.

[177] So held in National Masonic Acc. Assn. v. Burr, 44 Neb. 256; 24 Ins. L. J. 423; 62 N. W. Rep. 466.

dered by the court, recovery may be had by the beneficiary.[178] Where the statute so permits, an assessment may be tendered, and, if refused, the party may keep the money in his possession, and the tender is good where he subsequently pays it into court.[179] In mutual assessment companies, where the contract is such that the amount of the assessment is necessarily unknown, it cannot be within the intent of the contract that a member must tender an assessment everytime it becomes due, and even if the amount is actually known, the case would then be brought within that of Meyer v. Knickerbocker Life Insurance Company,[180] where it is held that a formal annual tender of premiums is not necessary after refusal.[181] So it is ordinarily required that notice of an assessment must be given, in which case it is a condition precedent to payment.[182] Nor need a tender of arrearages which are necessary to be paid to reinstate the member be made at a lodge meeting; a tender is sufficient, in such case, when made to an officer authorized to receive such moneys.[183] As between a subordinate and supreme lodge, or a member and the lodge, tender is payment so far as the protection of the relative rights of the parties are concerned. It is sufficient if made once where the party stands ready thereafter to pay on demand.[184] So a tender to

[178] March v. Supreme Lodge, 29 Fed. Rep. 896.

[179] Loughbridge v. Iowa L. & E. Assn., 84 Iowa, 141; 50 N. W. Rep. 568, under Code Iowa, sec. 2104.

[180] 73 N. Y. 516; 29 Am. Rep. 200.

[181] See secs. 1122, 1123, herein, as to tender and frequency of tender of premiums; Natural L. Ins. Co. v. Tullidge, 39 Ohio St. 240, where the company refused to accept a premium, and it was held that an action might be maintained to continue the policy in force; Day v. Connecticut L. Ins. Co., 45 Conn. 480; 29 Am. Rep. 693, where it was held that the holder might tender the premium, and wait till the policy became due and then sue; McKee v. Phœnix Ins. Co., 28 Mo. 383; 75 Am. Dec. 129, where it was held that if the company wrongfully refuses to receive a premium due, the insured may treat the contract as at an end.

[182] Jones v. Sisson, 6 Gray (Mass.), 288; Williams v. Babcock, 25 Barb. (N. Y.) 109; Coyle v. Kentucky Grangers' etc. Co. (Ky.), 2 S. W. Rep. 676; Hull v. Supreme Lodge, 24 Fed. Rep. 450.

[183] Manson v. Grand Lodge A. O. U. W., 30 Minn. 509.

[184] People v. Mutual L. Ins. Co., 92 N. Y. 105; Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 450. But see secs. 1122-1125, herein, as to tender of premiums.

the secretary of a mutual company of an assessment may be a good tender.[185]

§ 1281. Assessments and Dues—Death Before Time Specified for Payment Expires—Loss After Suspension.—If a note is given for a membership fee and the policy contains no condition for forfeiture for its nonpayment when due, and the time of payment thereof is extended, and death occurs before said period expires, no forfeiture arises by nonpayment of the note when first due;[186] and the directors may be empowered to exclude the insured from all benefits under his certificates, and still collect assessments on his premium note during his default where the whole note is absolutely collectible.[187] And where payment is required to be made within a specified time, or within a certain number of days after notice, otherwise the policy is to be forfeited, the fact that the assessment is unpaid when death occurs does not prevent a recovery if the period specified has not expired at the time of death.[188] But no recovery can be had for a loss occurring during suspension of the risk. Thus, where the assessment is required to be paid within ten days after demand, otherwise the policy is to be suspended until payment, and a loss occurs after the ten days and before the payment, no recovery can be had.[189] So where a member fails to pay certain dues and is suspended, and after his death the same are paid to the collector of the local society, the company will not be liable, even though a receipt is given therefor by the collector, the latter not having authority so to do.[190]

[185] Loughbridge v. Iowa L. & Endowment Assn., 84 Iowa, 141; 50 N. W. Rep. 568.

[186] Kansas Prot. Union v. White, 36 Kan. 760; 14 Pac. Rep. 275.

[187] Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425.

[188] Baker v. New York State Mut. etc. Co., 27 N. Y. Week. Dig. 91; Elmer v. Mutual B. L. Assn. of America, 19 N. Y. Supp. 289; 64 Hun (N. Y.), 639; 47 N. Y. St. Rep. 35; Painter v. Industrial L. Assn., 131 Ind. 68; 30 N. E. Rep. 876; Rogers v. Capitol L. etc. Co., 1 Week. Not. Cas. 588; Wright v. Supreme Commandery, 87 Ga. 426; 13 S. E. Rep. 564; Protection L. Ins. Co. v. Palmer, 81 Ill. 88.

[189] Blanchard v. Atlantic Mut. F. Ins. Co., 33 N. H. 9.

[190] Brown v. Grand Council, 81 Iowa, 400; 46 N. W. Rep. 1086.

§ **1282. Death of Member During Suspension of Lodge.** If a by-law of the supreme lodge provides for suspension of a subordinate lodge which refuses or neglects to forward assessments within a specified time, and also provides that "if a death occur in said lodge during such suspension no death benefit shall be paid," said clause shall be construed to read as if the words "during such suspension" had been added to said clause, for it would be an injustice to hold that a member who had promptly paid his dues to the local lodge should forfeit all his rights by reason of the fault or neglect of the lodge to perform its duty, especially where the lodge might thereafter be restored by paying up. The restoration of the lodge would restore the member's rights to benefits.[191]

§ **1283. Death While "Dues in Arrears."**—If the constitution of a mutual benefit society provides that a member shall be entitled to funeral benefits when at the time of his death he is "not more than three months in arrears," such provision will be so construed as not to exclude a member from funeral benefits where, although he is three months in arrears, he dies the day before the dues of the following month are payable.[192]

§ **1284. Payment Assessment after Loss.**—If the policy or certificate provides that nonpayment of an assessment on a premium note when due shall forfeit the policy, and the assured is notified, but neglects to pay the same, the policy will be void, and the company may refuse to accept a payment after loss.[193] And payment of an assessment after death by a friend of the assured—the latter in his lifetime having refused payment—is of no effect, even though the company accepts the same, where it is accepted in ignorance of the death.[194] So the collection of an assessment after loss does not render the insurer liable where by the conditions of the

[191] Supreme Lodge v. Abbott, 82 Ind. 1.

[192] So held in Sherry v. Operative Plasterers' Union (Pa. 1891), 20 Atl. Rep. 1062.

[193] Southern Mut. Ins. Co. v. Taylor, 33 Gratt. (Va.) 743.

[194] Miller v. Union Cent. L. Ins. Co., 110 Ill. 102.

contract the termination of the same does not affect the validity of the policy or the note with respect to past dues.[195] But the payment to the company and its retention of assessments after the death of the assured may render it liable unless accepted without knowledge.[196] Thus, if the assured during his lifetime requests payment of an assessment, and this is done after his death, and the company retains the money, such payment is good.[197]

§ **1285. Right to have Assessment Made.**—The company is bound by its contract, and is obligated to make the necessary assessments to meet losses in accordance therewith. Thus, where the assured, as a member of a mutual benefit society, promises to pay assessments in consideration that the company will pay a specified sum not exceeding a certain amount, and the contract specifies the time within which the loss shall be payable, giving the form of notice and process for collecting death assessments, said contract imports a promise on the part of the company that it will make or cause to be made the necessary assessment;[198] and where the right exists to have an assessment made on all the other policy-holders, the member's right cannot be limited by the enactment of a by-law to which he does not assent, which provides that assessments shall only be made on a certain class, and the directors may become liable personally to such member where they pay out money to which he is entitled, even though the same is done in good faith.[199] And if the liability to levy an assessment for a death benefit is absolute, this is not conclusively changed by an investigation of trustees whether the deceased was a member or not, even though the charter and by-laws provide that benefits shall not extend to those whose membership has ceased, and that deaths

[195] Wash v. Union Mut. Ins. Co., 43 Me. 343.

[196] Erdman v. Mutual Ins. Co. etc., 44 Wis. 376; Pritchard v. Mechanics' Assur. Soc., 3 Com. B., N. S., 622; Swett v. Protection Relief Soc., 78 Me. 541.

[197] Erdman v. Mutual Ins. Co. etc., 44 Wis. 376. See sec. 1374, herein, as to waiver by acceptance of assessments after loss or death.

[198] Lawler v. Murphy, 58 Conn. 294.

[199] Stewart v. Lee Mut. F. Ins. Assn., 64 Miss. 499.

are to be reported by the trustees.[200] So although it is provided in the constitution that a pro rata sum shall be paid in full satisfaction of a claim where a single assessment is insufficient, yet if the certificate provides that a claim shall be payable only from the death fund at the time of death, or from moneys realized from the next assessment, and every member is required to pay, when he becomes such, a first death assessment, a first death claim is not dependent for payment upon the death fund on hand, but a right exists to have it satisfied out of funds arising from an assessment to meet such claims.[201] But where certain necessary costs for an appraisal of damages are required to be deposited by the insured upon demand before an assessment is made, there can be no recovery if such security is demanded and refused.[202]

§ 1286. No Authority to Receive Less than the Amount of Assessment Due.—In view of the peculiar nature of the relations existing between members and the association, and the mutual obligations resulting therefrom, and the objects of the organization, it would seem to be undoubted that mutual benefit societies have no power to receive from a member an amount less than the actual sum due on the assessment, and it would also seem that the company has no power to accept other than cash or its equivalent in payment, as in case of promissory notes.[203]

§ 1287. Assessments and Dues—Safety Fund—Reserve Fund.—Where the contract provides for a safety fund for the benefit of living members by the use of the income of such fund toward the payment of dues and assessments, or by

[200] Dillingham v. New York Cotton Exch. (U. S. C. C. 1892), 49 Fed. Rep. 719.

[201] Wadsworth v. Jewelers & T. Co., 132 N. Y. 540; 26 Jones & S. (N. Y.) 88; 31 N. Y. St. Rep. 185; 9 N. Y. Supp. 711. In this case the pro rata clause was held vague and indefinite at the least, and not applicable to the facts.

[202] In this case the policy was on growing crops and the loss was by hail: Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427.

[203] Buffum v. Fayette Mut. Ins. Co., 3 Allen (Mass.), 360. But see 35, 36, herein.

a division of the same among those whose certificates are in force on the failure of the association to pay indemnities, and an assessment is levied prior to filing a bill for dissolution, the nonpayment of the same within the time limited for its payment, in order to keep the policy in force, will avoid the contract so as to preclude the holder from sharing in the safety fund. But this case differs from that where a certain sum is required to be paid to the safety fund within one year from the date of the certificate; for here, if the payment is made within the year, it is sufficient to entitle the certificate holder to share in the fund, even though the amount is not paid until after the bill is filed for dissolution; so also where certain monthly dues are not paid until after the association stops business and proceedings are pending to wind up its affairs.[204] Again, where the reserve fund is of like character, entirely excluding representatives of members deceased, and no absolute legal obligation rests upon the members to pay an assessment levied by the receiver, the nonpayment of such assessment does not forfeit the right to participate in the reserve fund.[205]

§ 1288. Refusal to Pay Assessments—Right to Have Fund Distributed.—If the contract provides for a reserve fund for the benefit of living members, and the company goes into a receiver's hands, those entitled to such fund and whose contracts are in force will share pro rata according to the amount contributed thereto by each, and the fact that a member has refused to pay an assessment which he was under no legal obligation to pay does not preclude his right to such share.[206] In the case establishing this proposition the right to the fund was limited to the living certificate holders, but the

[204] Burdon v. Massachusetts Safety F. Assn., 147 Mass. 360; 6 N. E. Rep. 840.

[205] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 30 N. E. Rep. 114; 43 N. Y. St. Rep. 204; 21 Ins. L. J. 385. See s. c., 16 N. Y. Supp. 80; 40 N. Y. St. Rep. 800.

[206] In re Equitable Reserve F. L. Assn., 131 N. Y. 354; 30 N. E. Rep. 114; 43 N. Y. St. Rep. 204; 21 Ins. L. J. 385. See s. c., 16 N. Y. Supp. 80; 40 N. Y. St. Rep. 800. See, also, Burdon v. Massachusetts Safety Fund Assn., 147 Mass. 360; 6 New Eng. Rep. 840.

contract provided that the reserve fund should not be applied to the payment of death claims until it should reach a specified sum, which it never did. There were also other conditions relating thereto. But in a Massachusetts case[206a] the safety fund was to be divided among certificate holders, and it was held that it should be divided among all members and representatives of members whose policies were in force at the date of filing the bill for dissolution. It is also held in New York that the rights of claimants to the reserve fund should be referred to the date of the commencement of the proceedings for dissolution of the company.[206b] If the company is incorporated as a fraternal beneficiary organization under a statute providing therefor, and issues benefit certificates payable out of a fund created by assessments levied for such purpose, and the society employs paid agents to solicit business contrary to the statute, a member to whom a certificate has been issued may refuse to pay assessments thereafter levied without forfeiting payments already made, and the certificate holders will, in such case, be entitled to have the fund distributed among them.[207]

§ 1289. Application or Appropriation of Funds by Society or Lodge.—Dues and assessments are collected for a specific purpose, and, with relation to the member who is called upon to pay them, the contract obligation governs. When said moneys are collected they should ordinarily be appried to the specific purpose for which they are collected. When assessments have been levied and paid to the company, the fund created thereby becomes, to a certain extent, a trust fund, and if the claim for which the assessment has been made is a lawful one, the company will be obligated to pay said benefit. Thus where a death claim has accrued and an assessment has been levied to satisfy the same, and the payment of the same having been delayed and the amount having subsequently passed into the hands of a receiver, the amount is subject exclusively to the payment of the claim which it was

[206a] See note 204 above.

[206b] See note 205 above.

[207] Fogg v. Supreme Lodge etc., 159 Mass. 9; 31 N. E. Rep. 289.

levied to meet, and is not an asset subject to other claims.[208] But while such funds are not assets subject to general debts, and while the beneficiaries may be entitled thereto, yet the company has the control of the same, in so far that it is not, by reason of the mere fact that the assessment has been levied and collected for a benefit, obligated to appropriate it to the settlement of the same, for if the claim is illegal and invalid, the company may refuse to pay it. This is an obligation which rests upon the proper officers of the company by reason of the fact that they act for and represent the members in the disposition of the funds to which they have contributed, and it may be reasonably presumed that the members did not contract to pay assessments to meet invalid and illegal claims. No waiver can arise from the fact that the payment has been made and received of an assessment to meet a mortuary call, for it may have been apparently valid, and not have proved to be invalid until afterward.[209] Again, the members may be obligated to

[208] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 40 N. Y. St. Rep. 800; 16 N. Y. Supp. 80; 43 N. Y. St. Rep. 204; 30 N. E. Rep. 114; 21 Ins. L. J. 385.

[209] Mayer v. Equitable L. Assn., 42 Hun (N. Y.), 237. The court, per Landon, J., said in this case: "The right to payment under the contract depended upon its validity, or at least upon the inability of the defendant to show its invalidity. That invalidity it offered evidence tending to show. The defendant was in a certain sense the agent of the members of the company, but was an agent with special and defined powers and limitations, and the true and obvious construction of those powers and limitations forbade payment upon a claim which it was able to show was procured through misrepresentation or fraudulent suppression of facts, concerning which it required answers from Stephan when he applied for membership. That it had realized the money with which to make payment was no waiver of its duty to see to it that payment was due; that duty it still owed to its members who had paid their assessments, trusting to the fidelity of the company to protect them and the fund from invalid claims": Id. 238. This case is cited in Stuart v. Mutual Res. Fund L. Assn., 78 Hun (N. Y.), 191, 193; 60 N. Y. St. Rep. 255, per Brown, P. J., who says: "Neither is the fact that the money to pay the claim was collected by assessments upon the members of the association available to the plaintiff, nor does it affect the right of the defendant to reject the claim upon evidence subsequently obtained. Such, I think, would be the duty the officers owed to the association, if they were satisfied from their examination

pay an assessment, although the directors might have resisted the payment of some of the losses included therein, for this does not invalidate it.[210] But although the society controls the funds, it holds them in trust, and cannot misapply the same for purposes not within its charter powers.[211] The fact that the statute under which the company is incorporated provides for a death fund "belonging to the beneficiaries of anticipated deceased members," in "an amount not exceeding one assessment," does not necessitate the payment of losses therefrom as they occur, but the officers may exercise their discretion concerning the application of the same to particular losses, and they may use all or only a portion, or none at all, of said fund, and may levy an assessment to meet losses

that there was a breach of the contract"; citing also Fisher v. Andrews, 37 Hun (N. Y.), 176. In Swett v. Relief Society, 78 Me. 541, it is held that an invalid contract is not made valid by the incorporation of the members of the voluntary association, and the assumption by that corporation of the contracts of the voluntary association, and that the company's treasurer could not ratify and make valid invalid contracts of insurance by acceptance, after the member's death, of unpaid assessments, and that the assessments paid by the members became the company's money under its by-laws, and that members could not control the disposition of assessments, but that the company could retain the money and control it: Id. 545, per Libbey, J.; In re Protection L. Ins. Co., 9 Biss. (C. C.) 188. Under the policies in this case the amount to be assessed was held not a general asset of the company. "It is so much money which each policy holder agrees to contribute to pay a death loss, and when collected does not belong to the company nor to its general creditors, but to this special class of creditors, most of whom could only maintain a suit on its guarantees, or for damages by reason of its neglect to make the assessment," per Blodgett, J., 198. See Wilber v. Forgerson, 24 Ill. App. 119.

[210] Sands v. Hill, 42 Barb. (N. Y.) 651. But see 2 Alb. L. J. 70; 55 N. Y. 18.

[211] State ex rel. Monitor etc. Assn., 42 Ohio St. 555. Money collected for such benefits by a subordinate lodge cannot be appropriated by it to the payment of assessments and for death benefits ordered by the grand lodge. The funds out of which sick benefits are payable are not the funds out of which death benefits are payable, and each fund being for a specific purpose, the money paid by the member cannot in such case be applied otherwise than for the purpose contemplated without his direction: Ancient O. U. W. v. Moore (Ky.), 9 Ins. L. J. 539.

if it deems proper without using such fund.[212] After the assessment has been paid the member cannot thereafter personally control its disposition, and cannot assign the same.[213] If the act of incorporation so provides, the holders of cash policies have a right to insist that the premium notes be first exhausted for losses before the cash fund be drawn on.[214]

§ **1290. Necessity for Assessment Must Exist.**—An assessment cannot be validly made unless the necessity therefor properly and legally arises. Every prerequisite to its validity must be complied with, and it must be made for a proper purpose, otherwise payment by a member is not enforceable.[215] In other words, the facts must be such as to occasion a legal necessity therefor;[216] for the contract under which a premium note is given makes the note a conditional promise to pay. It is dependent upon certain contingencies, and these conditions are precedent, and must exist, otherwise a vote to assess will have no validity, and the assessment will be unenforceable.[217] The mere passage of a resolution levying an assessment does not of itself create any liability;[218] but in certain cases acts done by a corporation presuppose the existence of other facts which are necessary to make them operative, and in such case there is presumptive proof of the former.[219]

[212] Crossman v. Massachusetts B. Assn., 143 Mass. 435; 9 N. E. Rep. 753, under Mass. Stats. 1880, c. 196, sec. 3.

[213] Swett v. Citizens' Mut. etc. Soc., 8 Me. 541.

[214] Clark v. Manufacturers' Mut. F. Ins. Co., 130 Ind. 332; 30 N. E. Rep. 212. See sec. 890, herein.

[215] Pacific etc. Ins. Co. v. Guse, 49 Mo. 329; American Mut. etc. v. Helburn, 85 Ky. 1; 2 S. W. Rep. 495; when assessment is legitimate, under Laws N. Y. 1879, c. 496; McGowan v. Supreme Coun. Cath. M. B. Assn., 76 Hun (N. Y.), 534; 58 N. Y. St. Rep. 268.

[216] Thomas v. Whallon, 31 Barb. (N. Y.) 178; American Ins. Co. v. Schmidt, 19 Iowa, 502; Pulford v. Fire Department etc., 31 Mich. 458.

[217] See cases cited in last two notes.

[218] Pacific etc. Ins. Co. v. Guse, 49 Mo. 329.

[219] Thus the necessity of an assessment may be presumed from notice to the subordinate secretary, where the rules of a benefit society require the supreme secretary to notify the subordinate secretary to collect a fixed assessment when the benefit fund is insufficient: Dennings v. Supreme Lodge K. of P. of the World, 131 N. Y. 522; 60 Hun (N. Y.), 350; 30 N. E. Rep. 572.

§ 1291. Prescribed Mode Must be Followed in Levying Assessment.—Sometimes no form or mode of making an assessment is prescribed, and no formal record thereof required to be kept, but the duty to assess is nevertheless imperative.[220] But if a mode is specified, it must be followed, and the assessment made on the losses and in the manner prescribed, otherwise no obligation rests upon the member to pay it, and no forfeiture can arise in case of its nonpayment, for the contract does not require that a member should pay an assessment which is illegally made.[221] Thus, if an assessment is not made according to the terms prescribed by the by-laws, it is invalid, and need not be paid,[222] and it is incumbent upon the corporation, if it seeks to recover an assessment on a deposit note, to prove that it was made in conformity with the requirements of the act of incorporation and by-laws.[223] The contract is between the member and the society, and the former has a right to rely upon the observance by the company and its officers of its terms. It is this obligation which determines the rights and liabilities of the respective parties as between them, and the member may insist that the requirements of the fundamental law of the society shall be observed by the organization, and that the mode of assessment agreed upon shall be strictly followed;[224] and the directors, in levying an assessment, must not overlook the plain provisions of their

[220] Backdahl v. Grand Lodge A. O. U. W., 46 Minn. 61; 48 N. W. Rep. 454; 20 Ins. L. J. 459. See Insurance Co. v. Sawyer, 12 Cush. (Mass.) 64.

[221] Conductor's Assn. v. Birnbaum, 116 Pa. St. 565; 10 Cent. Rep. 63; 11 Atl. Rep. 378; Baker v. Citizens' Mut. F. Ins. Co., 51 Mich. 243; Underwood v. Iowa Legion of Honor, 66 Iowa, 134; Atlantic F. Ins. Co. v. Sanders, 36 N. H. 252; Mutual B. L. Ins. Co. v. Jarvis, 22 Conn. 148.

[222] Appleton Mut. F. Ins. Co. v. Jesser, 5 Allen (Mass.), 446.

[223] Atlantic Mut. Ins. Co. v. Fitzpatrick, 2 Gray (Mass.), 279.

[224] Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. St. 492; Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; Covenant Mut. B. Assn. v. Spies, 114 Ill. 463; Nashua F. Ins. Co. v. Moore, 55 N. H. 48; American Ins. Co. v. Schmidt, 19 Iowa, 502. See chaps. xiv and xvi, herein, as to relative duties and obligations of the parties; Naill v. Kansas Farmers' F. Ins. Co., 47 Kan. 223; on rehearing, 27 Pac. Rep. 854; 26 Pac. Rep. 944; 25 Pac. Rep. 211; 14 Pac. Rep. 454.

charter in a search for some rule of action more purely equitable.[225] But the rule above given presupposes that the by-law under which the assessment is made is valid, for if it be invalid the fact that it is followed cannot of itself make the assessment legal, since a member is not estopped to deny the exercise of an authority not conferred by the charter, nor does the member's consent to such an authority confer it.[226] An unsigned, uncertified, and otherwise incomplete paper cannot be treated as an official assessment which under the charter and by-laws should have been signed, and the forfeiture of a policy cannot be predicated upon a failure to pay such an assessment.[227] If an assessment is not made in accordance with the society's constitutional provisions, it is no excuse that it was made in conformity with a custom of the society, unless the member against whom the forfeiture is claimed had knowledge of such fact.[228] Where the statute provides for petition to ratify assessments or calls made by mutual companies it applies to calls made under the statute, and not under the contracts contained in the deposit notes.[229]

§ 1292. Who Empowered to Levy Assessments.—The board of directors must levy the assessment when it is so provided in the by-laws,[230] and generally the assessment must be made by the officers, or authority designated,[231] although not only the corporation may levy an assessment, but the receiver may be empowered so to do.[232] If the assessments are required by the articles of incorporation and by-laws to be made by the secretary, they must be so made to be valid and warrant a forfeiture.[233] And the assessment may be valid when levied at

[225] Slater etc. Ins. Co. v. Barstow, 8 R. I. 343.

[226] Grand Lodge v. Stepp, 31 Pitts. L. J. 164, where the latter proposition is sustained.

[227] Baker v. Citizens' Mut. F. Ins. Co., 51 Mich. 243.

[228] Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

[229] Commonwealth v. Dorchester Mut. F. Ins. Co., 112 Mass. 142.

[230] Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341.

[231] Susquehanna Mut. Ins. Co. v. Trinckhannock Toy Co., 97 Pa. St. 424.

[232] See Hurlburt v. Carter, 21 Barb. (N. Y.) 221. See sec. 1273, 1274. herein, as to receiver.

[233] Bates v. Detroit Mut. etc., 51 Mich. 587.

a meeting of the board called by the president only,[233a] and the fact that one director was absent when an assessment was made does not invalidate it.[234] The directors, when empowered to make an assessment, can act only in conformity with and to the extent of the powers conferred, for they can have no arbitrary discretion.[235] The rules of the association may require the supreme secretary, when the benefit fund is insufficient, to notify the subordinate secretaries to collect a fixed assessment.[236] If an assessment is required to be made by the secretary, and is made by others, it is invalid, and neglect to pay the same does not warrant a forfeiture;[237] but the fact that a director had a personal interest as a member does not of itself invalidate an assessment.[238] An assessment is invalid if made by the grand lodge when the charter requires it to be levied by the subordinate lodge.[239] If mortuary assessments can be made under the constitution only by the board of directors upon submission by the secretary of proofs of deaths to the board, and, upon indorsement and approval of the president, an assessment may then be made, the directors are not invested with a power to make an assessment in their discretion upon presentment merely of proper proofs of death.[240]

§ 1293. Notice of Intention to Assess not Necessary for Directors' Regular Meeting.—An assessment on a premium note may be validly levied at a regular monthly meeting of the president and directors, held pursuant to the by-laws of the company and the statutes of the commonwealth, and in such case affirmative proof is unnecessary that notice was given to the directors that an assessment would be laid at

[233a] Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

[234] Williams v. German Mut. etc. Co., 68 Ill. 387.

[235] Thomas v. Whallon, 31 Barb. (N. Y.) 178. See St. Lawrence etc. Co. v. Paige, 1 Hilt. (N. Y.) 430.

[236] Dennings v. Supreme Lodge K. of P. of the World, 131 N. Y. 522; 60 Hun (N. Y.), 350; 30 N. E. Rep. 572.

[237] Bates v. Detroit Mut. etc. Co., 51 Mich. 587.

[238] Williams v. German Mut. etc. Soc., 68 Ill. 387.

[239] Agnew v. A. O. U. W., 17 Mo. App. 254.

[240] Railway Pass. etc. Assn. v. Robinson, 147 Ill. 138; 23 Ins. L. J. 79; 35 N. E. Rep. 168.

such meeting, although the directors have power to order an assessment if needed at any meeting called for that purpose,[241] Such a rule is based upon the fact that the duties of the directors are marked out by the charter and by-laws, which duties they are presumed to know, and they should come to a regular meeting, prepared to act, without special notice that the subject of levying an assessment would be considered at that meeting, and a notice of intention to assess is unnecessary in the absence of some requirement therefor, and the powers of the directors will not be enlarged by giving such notice. This rule also accords with the general rule relating to regular business meetings of corporations.[242]

§ 1294. Power of Directors to Assess Cannot be Delegated.—Although the fact of levying an assessment by the board of directors is a ministerial, and not a judicial, act,[243] and a distinction is made in regard to agents in this respect, it being declared that where the discretion is to be exercised in respect to an act which is ministerial and not judicial, it may be delegated; [244] yet, inasmuch as the fundamental law of the society is the source of authority, if the power conferred upon the directors to levy assessments invests them with a discretion

[241] Bay State etc. Ins. Co. v. Sawyer, 12 Cush. (Mass.) 64. The just conclusion is that they are to meet to perform duties as they may arise. These duties being marked out by the charter, no special notice to them is necessary.

[242] 2 Morawetz on Private Corporations, 2d ed., sec. 482, citing Sampson v. Bowdoinham Steam Mill Co., 36 Me. 78; Warner v. Mower, 11 Vt. 385, and other cases; Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen (Mass.), 27, in which the court said: "In the absence of any express provision in the by-laws as to calling of such meetings, the notice given by the secretary was sufficient, and they might proceed to act upon an assessment. The rule, 'notify all meetings of directors,' was complied with by the secretary, and this meeting was competent to make an assessment."

[243] Herkimer Co. Mut. Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; 7 How. Pr. (N. Y.) 210; Sands v. Sweet, 44 Barb. (N. Y.) 108; American Mut. Aid Soc. v. Helburn (Ky.), 8 Ky. L. Rep. 627.

[244] Burial Board etc. v. Thompson, 2 Ves. 458, per Willis, J.; Walsh v. Southworth, 6 Ex. 156, per Parke, B.; Baker v. Cave, 1 Har. & McH. 678, per Pollock, C. B.; Winchester v. Ayres, 4 G. Greene (Iowa), 104.

which is personal, such power must be exercised personally, and cannot be delegated.[245] This is in conformity with the rule that directors of corporations cannot delegate powers which it is intended that they should exercise personally.[246] So a board of directors authorized under the by-laws to levy assessments cannot delegate their power to the president.[247]

§ **1295. When Power to Assess may be Delegated—Exceptions to Rule.**—The board of directors may be expressly authorized by the charter to appoint a committee to make assessments, in which case it is necessary that the assessment be levied either by the board or by the executive committee,[248] and the board of directors acting upon notice of a death may direct the secretary to issue notices of assessments, in case its chairman shall, upon examination of the proofs of death when they arrive, find them correct. Such assessment conforms with a requirement that the board shall make all assessments and the chairman approve of the proofs of death.[249] So a board of directors may pass a resolution directing the secretary to levy an assessment, the articles of association specifying the amount.[250]

[245] "The general rule is that when the power to be executed involves necessarily the exercise of judgment and discretion, it cannot be delegated": Per the court in Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440.

[246] 2 Morawetz on Private Corporations, 2d ed., sec. 536; citing Silver Hood Road v. Greene, 12 R. I. 164, and other cases. Thus where the charter provided that the directors should "settle and determine losses and damages to be paid by the several members and their respective proportions" thereof, and the directors voted to assess to a certain amount, and a minority committee was appointed to make the assessment and fixed it for a less sum, it was held illegal: Monmouth Mut. F. Ins. Co. v. Lowell, 59 Me. 504.

[247] Garretson v. Equitable Mut. L. etc. Assn. (Iowa, 1895), 61 N. W. Rep. 952.

[248] American Mut. Aid Soc. v. Helburn, 85 Ky. 1; 8 Ky. L. Rep. 627; 2 S. W. Rep. 495.

[249] Passenger Conductors etc. v. Birnbaum, 116 Pa. St. 565; 11 Atl. Rep. 378. As to powers of directors of corporations generally to appoint a committeee to execute resolutions of the board, see 2 Morawetz on Private Corporations, 2d ed., sec. 535.

[250] Van Frank v. United States Mas. B. Assn., 158 El. 560; 41 N. E. Rep. 1005.

§ 1296. Assessment by Illegally Elected Board.—It is held that an assessment made by a board of directors illegally elected is invalid.[251] This decision is cited by a learned writer on corporations, under a section upon the liability of shareholders to pay unauthorized calls, and he says: "The shareholders have agreed to contribute the amount of their shares only after an authorized call has been made by properly elected agents, and until such a call has been made a condition precedent to their liability remains unperformed."[252] This case is, however, upon the point cited by Mr. Morawetz, opposed to the doctrine of the supreme court of Indiana, also noted and criticised by that authority, wherein it is held that "any irregularity or illegality in the election of the directors by whom calls were made is no ground on which the payment of the subscription for stock can be resisted."[253] A question might arise as to the right of a member to collaterally attack an assessment upon the ground stated in the above case,[254] and it is held that a member is estopped to say in defense to an action on a note that he and his associates have not complied with the charter provisions, nor may he deny the organization of the company.[255] It is also decided that the irregularity of election of the president does not invalidate the assessment.[256] But a member is not obligated to pay an assessment which is invalid because levied under a by-law inconsistent with the charter;[257] and there would seem to be every valid reason in favor of the proposition that the member has a right to insist that

[251] People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440. "By the terms of their contract their liability can only be created by an assessment or call made by the directors and officers in whose selection they were entitled to a voice. . . . . They were not bound to recognize as directors persons who were never lawfully chosen, and who were usurping the functions of an office already filled": Per Hoar, J.

[252] 2 Morawetz on Private Corporations, 2d ed., sec. 150, p. 151.

[253] 2 Morawetz on Private Corporations, 2d ed., sec. 150; citing Steinmetz v. Versailles etc. Turnpike Co., 57 Ind. 457, and other Indiana cases.

[254] People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440.

[255] Turnbull Co. Mut. F. Ins. Co., 17 Ohio, 407.

[256] Currie v. Mutual Assur. Co., 4 Hen. & M. (Va.) 318.

[257] National Mut. F. Ins. Co. v. Yeomans, 8 R. I. 25.

the assessment shall be made by those, and those only, who are authorized to levy the same, and the doctrine of the case first noted herein seems based on sound principles.[258]

§ **1297. Intentional Omission of Members.**—If a mutual company in levying an assessment intentionally omits some of the members who are liable thereto and should have been included, this invalidates the assessment as to all.[259] Although it is held in Minnesota that if other members are knowingly omitted in making an assessment on a premium note, it is merely voidable by the member assessed.[260] An assessment levied against a part only of the members in proportion to their premiums and deposits is invalid,[261] and the rule obtains although the assessment is accompanied by the computation of the liability of the omitted members, and by the intention to assess them accordingly on the expiration of their policies.[262] But the assessment will be valid and binding where a certain percentage is levied on the premium notes of all the members, although all their names are not specified nor the exact sum required to be paid by each,[263] and the fact that a few only of the members are omitted does not invalidate the assessment.[264]

§ **1298. Assessments Where Risks are Classified.**—Although a mutual company may be empowered to divide its risks into classes,[265] so that a premium note in one class shall only be liable in the first instance to assessments to meet losses occurring in that particular class to which it belongs, yet if the necessity arises all the assets and the notes of both classes must be applied to meet losses arising in either class; so

[258] People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440.

[259] Marblehead Mut. Ins. Co. v. Hayward, 3 Gray (Mass.), 208.

[260] Swing v. Akely Lumber Co. (Minn. 1895), 64 N. W. Rep. 97.

[261] People's Equitable F. Ins. Co. v. Arthur, 7 Gray (Mass.), 267; Herkimer Co. Mut. Ins. Co. v. Fuller, 14 Barb. N. Y.) 373; 7 How Pr. (N. Y.) 210.

[262] Marblehead Mut. Ins. Co. v. Hayward, 3 Gray (Mass.), 208.

[263] Lycoming F. Ins. Co. v. Rought, 97 Pa. St. 415.

[264] Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

[265] White v. Ross, 4 Abb. App. Dec. (N. Y.) 589; 16 Abb. Pr. (N. Y.) 66; Union etc. Co. v. Keyser, 32 N. H. 313.

also if the assets in one class are insufficient, resort must be had to the other class for the deficiency.[266] And a premium note is assessable for losses where the fund produced by the cash premiums has been exhausted.[267] But in case of cash premium policyholders in a mutual fire company organized under the Indiana statute, it is held that the premium notes must first be exhausted to pay losses before the cash fund can be drawn upon.[268] If the charter or by-laws require the separation of property into classes, and provide for liability only within each class, such division cannot be ignored in levying an assessment, and in such case, if the assessment is made generally, it is invalid;[269] and the funds of one class must, if so required, be exhausted before resorting to those of another class,[270] but only those who are members of a particular class at the time of the adoption of a by-law authorizing the directors to assess according to such division can be assessed,[271] until such other notes have paid assessments equal to the interest paid on notes of its class. But although the articles of association allow a division of risks into classes, and provide that premium notes shall only be assessed for losses in the class to which they belong, yet an assessment for notes for losses based upon such a division is void if such classification is opposed to the policy and provisions of the statutes.[272] If the business of a mutual fire insurance company is divided into classes, and the statute requires the same to be conducted separately and independently each class from the other, and also specifically provides that in no case shall an assessment

[266] White v. Roes, 4 Abb. App. Dec. (N. Y.) 589; 16 Abb. Pr. (N. Y.) 66; Sands v. Sanders, 28 N. Y. 410; Commonwealth v. Mechanics' Mut. Ins. Co., 112 Mass. 192.

[267] White v. Havens, 4 Abb. App. Dec. (N. Y.) 582; Sand v. Hill, 42 Barb. (N. Y.) 651.

[268] Clark v. Manufacturers' Mut. F. Ins. Co., 130 Ind. 332; 30 N. E. Rep. 212, under Rev. Stats. Ind. 1881, secs. 3752, 3753.

[269] Atlantic Mut. F. Ins. Co. v. Moody, 74 Me. 385; Allen v. Winne, 15 Wis. 113. See Keelly v. Troy Ins. Co., 3 Wis. 254.

[270] Longpond Ins. Co. v. Houghton, 6 Gray (Mass.), 77.

[271] Miller v. Georgia Mut. L. Ins. Co., 52 Ga. 221.

[272] Thomas v. Achilles, 16 Barb. (N. Y.) 491.

be made by the company or association upon the premium notes of one class for the losses or expenses of the other class,[273] neither the premium notes of one class nor the proceeds of the same can be diverted for losses or expenses, neither directly by assessments on account of the prohibition of the statute, nor may the law be evaded by suffering a judgment by default, for such judgment is unenforceable against property in the class other than that in which the policy is issued.[274] The conclusion from these decisions is, that the company's right to divide its risks into classes and to base its assessments upon such division must be governed by the law under and by virtue of which it is created and exists, and that it may be empowered to regulate these matters by its charter or by-laws not inconsistent with express statutory provisions, mandatory or prohibitory in their nature, and where the statute is mandatory, it must be followed, and where it prohibits the use of funds in other than a particular manner, it must likewise be observed.

§ **1299. Assessment Invalid of Certificate Changed to Life Policy with Regular Premiums.**—If a company organized as an assessment and endowment company changes its plan after issuing a certificate, and issues in effect a supplemental ordinary life policy, with regular premiums at stated intervals, it cannot assess the assured under the first certificate, and a demand therefor, coupled with a demand for premiums under the supplementary policy, excuses nonpayment of the premiums on the latter.

[273] Sess. Laws Kan. 1875, c. 111; Comp. Laws, 1879, c. 50 a.

[274] Naill v. Kansas Farmers' F. Ins. Co., 47 Kan. 223; 27 Pac. Rep. 854 (this case was in court from 1887 to 1891). See Insurance Co. v. Amick, 37 Kan. 73; 14 Pac. Rep. 454; 45 Kan. 74; 25 Pac. Rep. 211; 49 Kan. 726; 26 Pac. Rep. 944. The last two decisions were in favor of the insurance company, upon the ground that a general judgment could not be enforced against property in another class than that to which the insurance belonged, and it was declared in the opinion of the last case "that the premium notes of the first class could not be assessed or used to pay a loss in the second class."

[275] So held in Colby v. Life Indemnity etc. Co., 57 Minn. 510; 59 N. W. Rep. 539.

§ 1300. When Assessment may be Made.—The plans or schemes of mutual insurance are so many and different, and the contracts so various,[276] that no more definite rule can be formulated for determining when an assessment may be levied than the general one that the terms of the contract must govern in all cases. The contract may be such that upon death of a member and notification by the secretary each surviving member will be obligated to pay, within a specified time after such notification, the amount required by the rules of the association, otherwise to forfeit his certificate.[277] An assessment may be made although there is a reserve fund, it being a matter of discretion with the directors or officers whether all such fund shall be used or only a portion, or none at all.[278] So an assessment may be valid, although the benefit has been paid, where payment is made out of the reserve fund which the assessment is levied to reimburse.[279] As we have already seen, an assessment may be made after the policy has been suspended or forfeited, or even after loss or death.[280] It may also be made after insolvency,[281] but an assessment by directors after an assignment in insolvency is void.[282] Delay in levying an assessment may be excused, although the contract provides for a levy without delay, and, in view of all the circumstances, is not unreasonable, as in case of intervening litigation or a settlement of controverted rights.[283] And a mutual insurance company is not obligated after each loss to compute an assessment at once on its deposit notes liable thereto; it is sufficient to adopt a rule of procedure that will practicably and reasonably approximate thereto;[284] and although the act of incorporation requires the directors to levy an assess-

[276] See sec. 343, herein.

[277] McDonald v. Ross-Lewin, 29 Hun (N. Y.), 87.

[278] Crossman v. Massachusetts B. Assur. etc. Co., 143 Mass. 435; 9 N. E. Rep. 753.

[279] McGowan v. Supreme Council etc. B. Assn., 76 Hun (N. Y.), 534; 28 N. Y. Supp. 177.

[280] Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[281] See secs. 1256, 1281, 1284, herein.

[282] Schimpf v. Lehigh Valley etc. Ins. Co., 86 Pa. St. 373.

[283] People's Ins. Co. v. Allen, 10 Gray (Mass.), 297.

[284] New England Mut. Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

ment "forthwith" to meet claims under policies exceeding the amount of the company's existing funds, exclusive of the members' deposit notes, yet if the company delays for a time which is not unreasonable to make an assessment, it is not thereby invalidated.[285]

§ **1301. Assessment to Pay Unearned Premium.**—It is held that premium notes of members may be assessed to repay unearned premiums. This was so held where the company was organized under the Minnesota laws,[286] and was also empowered to enter into contracts for all cash premiums;[287] the holders of policies in the latter class not being members of the company, and the contract not being mutual, but a simple insurance contract. The unearned premiums for which it was held the premium notes might be assessed were those to which the holder of the cash premium policy was entitled upon the termination of the policy by insolvency proceedings.[288] So in Michigan assessments cannot be made to pay unearned or returned premiums where the member contracts to pay only assessments for losses.[289] In Massachusetts, however, it is held that the liability under the statute of a member as a corporator in a mutual fire insurance company does not authorize an assessment to repay unearned premiums, but that the deposit notes must be first exhausted for the losses.[290] So in an Indiana case, where the party paying a definite sum in cash in lieu of a premium note was not a member, nor entitled to share in the surplus, and the statute provided for the appropriation of funds to the payment first of expenses and then to whatever damages the member was entitled to claim under his policy, it was

[285] Marblehead Mut. Ins. Co. v. Underwood, 3 Gray (Mass.), 210, under Mass. Rev. Stats., c. xxxvii, sec. 31; Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

[286] Gen. Laws, 1881, c. 91.

[287] Under Laws Minn. 1885, c. 180.

[288] In re Minneapolis Mut. F. Ins. Co. (Powell v. Wyman), 49 Minn. 291; 51 N. W. Rep. 921.

[289] Detroit Mfrs. Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; 59 N. W. Rep. 661.

[290] Commonwealth v. Monitor Mut. F. Ins. Co., 112 Mass. 150; Commonwealth v. Mechanics' Mut. F. Ins. Co., 112 Mass. 192.

held that the cash premium policy-holders were entitled to claim repayment of unearned premiums upon the appointment of a receiver, but that the premium notes could only be assessed for payment of fire losses.[291]

§ 1302. Slight Errors do not Invalidate—Material Errors or Omissions do.[292]—If an assessment made in good faith, under circumstances which legally warrant such an exercise of power, is substantially in conformity with the necessary requirements, and based upon correct principles, it is valid, and will not be declared illegal for errors which are slight and immaterial.[293] Nor need the statement enter into the minute details; it is only necessary that it clearly appears from the facts that a necessity existed for the levy,[294] and a slight error in the amount stated in the notice which arises from a miscalculation will not of itself prevent the company from recovering the amount actually assessed and due.[295] But if assessable notes to any amount which should have been included are omitted intentionally, the assessment will be void,[296] and where the by-laws provide for the assessment pro rata of all expired policies for losses occurring at the time they expire, a failure to include such policies in an assessment avoids it.[297] But if the receiver has assessed all premium notes in his hands, his omission to include certain notes that have been illegally surrendered will not enable the makers of such notes, no other member objecting, to resist such assessment.[298] But the assessment may be valid, notwithstanding the omission of such as-

[291] Clark v. Manufacturers Mut. F. Ins. Co., 130 Ind. 332; 30 N. E. Rep. 212.

[292] See also preceding and following sections.

[293] Marblehead Ins. Co. v. Underwood, 3 Gray (Mass.), 210; New England Mut. Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

[294] Lycoming Ins. Co. v. Bixby, 15 Week. Not. Cas. 109.

[295] Thropp v. Susquehanna Mut. F. Ins. Co. (Pa.), 17 Atl. Rep. 473.

[296] Herkimer Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; Marblehead v. Hayward, 3 Gray (Mass.), 208.

[297] Susquehanna Mut. F. Ins. Co. v. Jackenbach (Pa.), 9 Atl. Rep. 90.

[298] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771.

sessable notes, where the omission does not arise from a fraudulent intent and the amount is so small as to be immaterial.[299] If a deficiency does not appear to have arisen by reason of a failure to collect an assessment, a member is not liable, although the deficiency be the result of "error, mistake, or miscalculation." [300]

§ **1303. Second Assessment of Note.**—If an assessment has been levied upon a premium note and the same remains outstanding and uncollected, a second assessment for the whole amount of the note is not void where it is made upon the same members for the same purposes, and embraces the same object, or is made by reason of difficulties and errors existing in a former assessment, or where it is made in place of a previous illegal assessment not enforced.[301] Where a deficiency arises by reason of the failure to collect an assessment in full, and a new assessment becomes necessary, it should be levied upon the same members.[302]

§ **1304. Assessment—New Policy Substituted for Old One through Fraud.**—If the insured has given notes as a premium for a five year policy, which policy he is induced to surrender by fraudulent representations of the company, and upon the assurance that it will issue a "duplicate," but more liberal and less onerous, policy, but in fact his liability is doubled under the "duplicate" policy, he is not liable to an assessment made by the company's receiver on such notes under the provisions of the new policy.[303]

§ **1305. Levying Assessments—Amount—Inequality.** The directors cannot ignore the cardinal rule which requires

[299] Fayette Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

[300] Ionia E. & B. Farmers' etc. Ins. Co. v. Otto, 96 Mich. 558; 22 Ins. L. J. 857; 56 N. W. Rep. 88, 755; 97 Mich. 522.

[301] Sands v. Sweet, 44 Barb. (N. Y.) 108, following Jackson v. Slyke, 44 Barb. (N. Y.) 116, note; citing People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.) 297; and questioning Campbell v. Adams, 38 Barb. (N. Y.) 132.

[302] Farmers' Ins. Co. v. Chase, 56 N. H. 341.

[303] Wyman v. Gillett, 54 Minn. 536; 56 N. W. Rep. 167.

them to observe the fundamental law of their corporate existence in making assessments, and an assessment of a certain per cent on all premium notes without a consideration of the just proportion of the losses incurred and the amounts paid on said notes is invalid for its inequality.[304] But where the company transacts business on both the stock and mutual plan, and moneys received from premiums under the stock plan are appropriated to paying losses, whereby the early members of the mutual class are relieved from assessments on their notes and others are left to be assessed for subsequent losses, there is no remedy for such inequality, and those whose notes are in force when such losses occur are liable.[305] An assessment cannot be levied for a larger amount than that provided for by the charter, even though authorized by a by-law.[306] Directors, as a rule, may not exercise an arbitrary discretion in levying assessments, but must be controlled by the authority conferred upon them, and must act in good faith and within a reasonable discretion.[307] So if fire policies be for different terms with different rates of premium, an assessment for each month's losses is not void for inequality if based upon a division of the premium for each policy of the member representing the years of its duration.[308] Although if it appears that the discretion conferred in levying assessments concludes the members, as where they under their contract have obligated themselves to pay such sums as should be assessed, it is held that such act of the directors is final, especially when the amount of the call does not appear to be so inconsistent with the established course of business of the company as to show that it was not made in good faith, and in the proper and judicious course of administration of the company's affairs.[309]

[304] Davis v. Parcher etc. Co., 82 Wis. 488; 52 N. W. Rep. 771; Rev. Stats. Wis., sec. 1907. See, also, Commonwealth v. Union Mut. Ins. Co., 112 Mass. 116.

[305] Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

[306] National Mut. F. Ins. Co. v. Yeomans, 8 R. I. 25.

[307] See Rosenberger v. Washington F. Ins. Co., 87 Pa. St. 207; Thomas v. Whallon, 31 Barb. (N. Y.) 178; Sands v. Hill, 58 N. Y. 94.

[308] Citizens' Mut. F. Ins. Co. v. Lortwell, 10 Allen (Mass.), 110.

[309] Commonwealth v. Dorchester etc. Ins. Co., 112 Mass. 142, 145, et seq. The court, per Wells, J., says in this case: "But the basis of

An assessment in a mutual fire company may be validly levied by percentages upon what is known as an "assessment basis" calculated for each policy, by multiplying the premium rate by twenty, such "assessment basis" being ascertained by multiplying the amount of insurance by the premium note, and all assessments being levied alike upon all members in the same manner.[310] The assessment must be levied with reference to the losses for which the company is then responsible, and to which the member may be called upon to contribute.[311]

§ 1306. Examination and Allowance of Claims.—As we have stated, a necessity must exist within the terms contemplated by the contract for making an assessment, for it is upon these conditions that the member has promised to contribute.[312] And where the contract provides that the premium notes shall be liable for losses and expenses, an assessment must be based upon an examination and determination of the amount of losses and expenses, and of the notes liable to be assessed therefor. While this does not exclude the exercise of a reasonable discretion in ascertaining the facts, nevertheless the facts must be inquired into, and where the entire amount of the note is assessed without the necessary inquiry, the assessment is void,[313] and proof is inadmissible to supply such

recovery of the amount of the note or any portion of it, and the test of the validity of an assessment, must be found in the contract, except so far as it is referred to the statute by the terms of the note or the by-laws of the company": Id. 147. This decision, however, overrules that of a former case in the same state, where it was held that an assessment by the company of a greater amount than is necessary to enable it to meet existing claims against it, together with a reasonable allowance for expenses and failures to make collections, is invalid; and an allowance for these purposes of a sum more than the whole amount of the deficiency in its funds is unreasonable if no special circumstances are shown to justify the excess: People's etc. Ins. Co. v. Babbitt, 7 Allen (Mass.), 235; Rosenberger v. Washington Ins. Co., 87 Pa. St. 207.

[310] Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. St. 499; 20 Atl. Rep. 502.

[311] Commonwealth v. Union Mut. Ins. Co., 112 Mass. 116.

[312] See sec. 1290, herein.

[313] Sands v. Graves, 58 N. Y. 94; Embree v. Schickelor, 36 Ind. 423.

omission,[314] and the claims allowed may be shown in defense to have been void or fraudulently allowed.[315] But an assessment may be ordered, subject to the examination of proofs of death by the secretary and his approval,[316] and the fact that some of the losses might have been successfully resisted on technical grounds does not invalidate the assessment.[317] If a death claim accrues after involuntary dissolution of a benefit association, it is not entitled to participate in the death fund with claims maturing before the dissolution, although it may be entitled to participate in the reserve fund.[318]

§ **1307. What may be Included.**—An allowance may be made in making an assessment upon premium notes for losses paid out of the funds derived from cash premium policies.[319] So an assessment may be made to repay money borrowed to pay a loss if levied upon those liable for such loss.[320] Payments of prior illegal assessments may be credited the members, and a new assessment may include the amount paid;[321] and if such assessment is partly paid, the sum may be included,[322] and an assessment may be made to pay back sums voluntarily paid the company under a previous assessment which has been adjudged invalid, together with interest thereon.[323] And an assessment by a receiver may be allowed under a statute for uncollectible claims, and it is not invalid, although for a larger amount than the company's actual indebtedness and the estimated expense of collection. It is sufficient, in such cases, that the assessment is substantially correct and is

[314] Sands v. Graves, 58 N. Y. 94.

[315] People's Mut. F. Ins. Co. v. Allen, 10 Gray (Mass.), 297.

[316] Passenger Conductors etc. v. Birnbaum, 116 Pa. St. 565; 11 Atl. Rep. 378.

[317] Sands v. Hill, 42 Barb. (N. Y.) 651.

[318] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 40 N. Y. St. Rep. 810; 16 N. Y. Supp. 80; 43 N. Y. St. Rep. 204; 30 N. E. Rep. 114.

[319] Sands v. Graves, 58 N. Y. 94.

[320] Toby v. Russell, 9 R. I. 58.

[321] People's Equitable Ins. Co. v. Petitioners, 9 Allen (Mass.), 319.

[322] People's Mut. F. Ins. Co. v. Allen, 10 Gray (Mass.), 297.

[323] People's Equitable Ins. Co. v. Petitioners, 9 Allen (Mass.), 319.

made in good faith.[324] An allowance may be made for return premiums on canceled policies,[325] and an assessment may include losses chargeable upon each policy for the month in which the assessment expired, and exclude those in the month in which it began, the assessment being based upon a computation of losses from month to month.[326] So a reasonable amount may be included for expenses and the insolvency of members,[327] and for other expenses and debts.[328]

§ 1308. What Need not and May not be Included.—An assessment upon a premium note in which a former unpaid assessment is included is irregular.[329] Claims which are uncollectible and worthless need not be considered,[330] and the fact that illegally surrendered notes are not included does not invalidate the assessment by a receiver when he assesses all notes in his hands.[331] A deficiency from uncollectible notes may not be included.[332] An assessment for losses and expenses, or which includes losses and bad debts, is invalid and uncollectible where the power to assess is limited to the amount of losses unpaid at the time of making the assessment.[333]

[324] Tobey v. Russell, 9 R. I. 58; Wardle v. Townsend, 75 Mich. 385. But see York etc. Ins. Co. v. Bowden, 57 Me. 280.

[325] Fayette Ins. Co. v. Fuller, 8 Allen (Mass.), 27.

[326] People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.), 297.

[327] Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. St. 492; 9 Atl. Rep. 90; Crossman v. Massachusetts Mut. B. Assn., 143 Mass. 435.

[328] People's Equitable Ins. Co. v. Petitioners, 9 Allen (Mass.), 319. As to losses and expenses prior to membership, see sec. 1256, herein.

[329] Campbell v. Adams, 38 Barb. (N. Y.) 132; Planters' Ins. Co. v. Comfort, 50 Miss. 662.

[330] Marine Ins. Co. v. Neal, 50 Me. 301.

[331] Davis v. Oshkosh Upholstery Co., 82 Wis. 488; 52 N. W. Rep. 771.

[332] Bangs v. Grey, 2 Kern. (N. Y.) 569. See Farmers' Mut. Ins. Co. v. Chase, 56 N. H. 341. The defendant was assessed to supply a deficiency from uncollected assessments made before the existence of his policy. Such an assessment would be invalid against the defendant: Long Pond Co. v. Houghton, 6 Gray (Mass.), 77.

[333] Sinissippi Ins. Co. v. Taft, 26 Ind. 240; York Co. Mut. F. Ins. Co. v. Bowden, 57 Me. 286. In this case the court said: "The provisions of the law contemplate the assessment of notes to meet actual liabilities in just proportions. One class cannot be called upon to pay

§ 1309. Anticipated Losses.—If no provision is made for an assessment to meet anticipated losses, no such assessment can be levied, and if the directors are required to examine into a claim for loss, and to levy an assessment if it be valid, they have no authority, in such case, to assess for future losses which are in anticipation only.[334] So a premium note is not assessable for losses anticipated upon an assumed failure of others to contribute their proportion of losses.[335] If all the deposit notes and one per cent is not more than sufficient to pay a loss on property destroyed by fire, and before the deposit notes are collected other property is destroyed, the losers under the last fire cannot recover any part of the assessment made under the original loss.[336] It is declared, however, in Wisconsin that an assessment may be levied for anticipated losses.[337]

§ 1310. Regularity of Assessment Must be Affirmatively Shown—Allegation and Proof—Evidence.—As has stated in a prior section, the act of making an assessment is a ministerial, and not a judicial, one;[338] therefore, no presumption can arise in favor of the regularity or legality of assessments,[339] and it is an affirmative matter, both of pleading and evidence, necessary to establish a forfeiture for nonpayment of an assessment, that the assessment should appear to have been made in the manner, mode, and in conformity with the

losses and expenses of another class": Sinissippi Ins. Co. v. Farris, 26 Ind. 342; Sinissippi Ins. Co. v. Wheeler, 26 Ind. 336. The court said: "It was not in the power of the board of directors to make assessments on premium notes beyond the sum necessary to pay the amount due and unpaid on losses": Bersch v. Sinissippi Ins. Co., 82 Ind. 64.

[334] Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; Thomas v. Whallon, 31 Barb. (N. Y.) 172; Rosenberger v. Washington F. Ins. Co., 87 Pa. St. 207.

[335] York Co. Mut. F. Ins. Co. v. Turner, 53 Me. 225. See, also, Thomas v. Whallon, 31 Barb. (N. Y.) 172.

[336] Caston v. Alleghany Mut. Ins. Co., 1 Pa. St. 322.

[337] Kelly v. Troy F. Ins. Co., 3 Wis. 329, per the court.

[338] Section 1294 herein.

[339] American Mut. Aid Society v. Helburn, 85 Ky. 1; 2 S. W. Rep. 495; Sounds v. Sweet, 44 Barb. (N. Y.) 108.

authority given, and for a proper purpose.[340] A general allegation that it was "duly made" is insufficient.[341] It must appear that the loss occurred before making the assessment and during the terms of the policies assessed; also that the levy was made upon all the members liable to contribution, and, if necessary, the amount due from delinquents on assessments should be collected in a proper suit therefor.[342] The person assessed must also be shown to have been a member when the assessment was levied, and that the loss for which it was made accrued during the continuance of the member's liability therefor.[343] There must also be proof of the losses and expenses for which the assessment was levied;[344] and if a receiver sues to recover assessments, the complaint must aver all the necessary facts showing a liability on the premium notes.[345] If an action is brought to recover an assessment, and the proof shows an excess therein, but it is not so large in amount as in itself to import fraud or gross mistake, the jury may give a verdict for the plaintiff. The burden of proof of fraud or misconduct rests, in such case, upon the party relying thereon as a defense.[346] Where the defense of nonpayment of an assessment resulting in forfeiture was set up in an action on a benefit certificate, it was held error to reject evidence of the receipt from the supreme secretary by the section secretary, of the notice to pay a fixed assessment required under the by-laws to be given where there was not enough of the fund in a certain class to pay the benefit; such evidence was rejected on the ground that it was not shown that the assessment was

[340] American Mut. Aid Soc. v. Helburn, 85 Ky. 1; 2 S. W. Rep. 496; Mutual Ins. Co. v. Houghton, 6 Gray (Mass.), 77; Shea v. Massachusetts M. B. Assn., 160 Mass. 289; 23 Ins. L. J. 214; 25 N. E. Rep. 855; 39 Am. St. Rep. 475; Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray (Mass.), 279; Mutual B. L. Ins. Co. v. Jarvis, 22 Conn. 148; Pacific Ins. Co. v. Guse, 44 Mo. 329; 8 Am. Rep. 132.

[341] American Mut. Aid Soc. v. Helburn, 85 Ky. 1; 2 S. W. Rep. 496.

[342] Planters' Ins. Co. v. Comfort, 50 Miss. 662.

[343] Columbia F. Ins. Co. v. Kinyon, 37 N. J. L. 33.

[344] Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; 8 Am. Rep. 132.

[345] Manlove v. Burger, 38 Ind. 211.

[346] Susquehanna Mut. F. Ins. Co. v. Gackenback, 115 Pa. St. 492; 9 Atl. Rep. 90.

regularly made, but it was declared that the fact of the sending of said notice was presumptive proof of the necessity for an assessment, and that the fund was insufficient to meet the loss.[347] The record of losses kept by the association may, under the contract, be prima facie evidence that losses have occurred,[348] and the charter of the company may provide that the certificate of the secretary shall be prima facie evidence of the assessment.[349] And the provision applies to an action on the note to the extent that it is prima facie evidence of the validity of the assessment and its amount.[350] The company's books or records, or an examined and proven copy thereof, showing the proper authorities had acted, etc., and also showing the forfeiture, if relied on, should first be produced; if not obtainable, then the absence thereof accounted for before parol evidence is admissible. An attempt to prove by the testimony of officers what the records should show is an attempt to introduce secondary evidence.[351]

§ 1311. Defenses to Actions — Assessments — Premium Notes.—The noncompliance with the provisions of the charter is no defense to an action for an assessment on a deposit note.[352] The rule is the same in mutual as in stock companies, that a member is estopped to deny the organization of the company;[353] nor may the maker be heard to say that the notes

[347] Dennings v. Supreme Lodge, 131 N. Y. 522; 60 Hun (N. Y.), 350; 43 N. Y. St. Rep. 872; 30 N. E. Rep. 572; reversing 38 N. Y. St. Rep. 979: 14 N. Y. Supp. 834.

[348] People's Ins. Co. v. Allen, 10 Gray (Mass.), 297.

[349] Williams v. German Mut. F. Ins. Co., 68 Ill. 387; Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. St. 492; 9 Atl. Rep. 90.

[350] Williams v. German Mut. F. Ins. Co., 68 Ill. 387.

[351] Phœnix Mut. F. Ins. Co. etc. v. Bowersox, 6 Ohio (C. C.), 1; Dial v. Valley Mut. L. Assn., 29 S. C. 560.

[352] Trumbull Co. Mut. F. Ins. Co. v. Homer, 17 Ohio, 407.

[353] Citizens' Mut. Ins. Co. v. Lortwell, 8 Allen (Mass.), 217; Browner v. Hill, 1 Sand. (N. Y.) 629; Dettra v. Kestner, 147 Pa. St. 566, 572; 23 Atl. Rep. 889; Sands v. Hill, 42 Barb. (N. Y.) 651; Browner v. Appleby, 1 Sand. (N. Y.) 158. As to estoppel generally to deny illegality of act of corporation in excess of the charter or the legality of its corporate existence, see 2 Morawetz on Private Corporations, 2d ed., secs. 692, 750, 774, 778, note.

were given in advance without any insurance therefor,[354] and insolvency before the expiration of the policy will constitute no defense to an action on a premium note.[355] If the policy is void ab initio, the premium notes cannot be collected.[356] In an action brought by the subordinate lodges of the Independent Order of Odd Fellows in Kansas against the grand lodge of such order in that state, it appeared that an assessment had been made by the grand lodge of Kansas upon these subordinate lodges, for the purpose of founding a home for the orphans of deceased Odd Fellows. Both parties recognized the sovereign grand lodge of the United States as having full legislative and judicial power in all matters relating to the order, and that an appeal lay to this lodge from the decision of the grand lodge. The plaintiffs asked for an injunction of this assessment, but the court refused it, no appeal to the sovereign lodge having been taken, and this action of the court was held no error.[357] It is held that the maker of a premium note may defend an action on the same on the ground of fraud or false representations in inducing him to enter into the contract.[358] But such facts constitute no defense to an action by the receiver to recover assessments where members have joined thereafter, and so even though the fraud is not discovered until after the appointment of the receiver; it being held that the rights of innocent members having intervened, it was necessary to their protection that the action be sustained;[359] and the same decision was given in another case under substantially the same facts, with the addition, however, that the member knowing of said facts had held his policies and slept on his rights until the appointment of trustees to wind up the company's af-

[354] Browner v. Appleby, 1 Sand. (N. Y.) 158; Brown v. Crooke, 4 N. Y. 51.

[355] Sterling v. Mercantile Mut. Ins. Co., 32 Pa. St. 75.

[356] Frost v. Saratoga Mut. Ins. Co., 5 Denio (N. Y.), 154; Bersch v. Sinissippi Ins. Co., 28 Ind. 64.

[357] Reno Lodge v. Grand Lodge (Kan. 1895), 37 Pac. Rep. 1003; 26 L. R. Annot. 98.

[358] Whitman v. Messner, 34 Ind. 487.

[359] Dettra v. Kestner (Pa. 1892), 23 Atl. Rep. 889; Fogg v. Pew, 10 Gray (Mass.). 409.

fairs.[360] But if the representations were made when the note was given in order to obtain it, they constitute a defense,[361] and the insured may not show that he had no insurable interest in the property in an action on the deposit note for an assessment levied, where said note acknowledges the receipt of a policy.[362] Where a decree was given against a mutual benefit society ordering the officers of such society to levy an assessment adjudged due from defendant to plaintiff, the fact that such officers were not parties to the action is not a ground for complaint on the part of the defendant, since it adds nothing to the effect of the decree.[363] In Pennsylvania, if the by-laws are not attached to the policy, it does not appear what are legal assessments, and a failure to pay assessments due operates as a forfeiture so that the assured may in such case recover, although it is alleged that an assessment was due from assured at the time of the loss.[364]

§ **1312. Statute of Limitations—Assessments.**—In cases of assessments on premium or deposit notes, the agreement being to pay the amount required and when required, the statute of limitations does not commence to run until the date of levying an assessment.[365] And although an assessment to the full amount of the note has been made, the statute runs from the time the same becomes due and payable.[366]

[360] Mansfield v. Cincinnati Ice Co. (C. P. C. O. 1892), 28 Week. L. Bull. 113.

[361] Fogg v. Pew, 10 Gray (Mass.), 409. See sec. 1256, herein.

[362] New England Mut. F. Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

[363] Prader v. National Mas. Acc. Assn. (Iowa, 1895), 63 N. W. Rep. 601.

[364] Haverstick v. Pennsylvania T. M. F. Ins. Assn., 156 Pa. St. 333: 27 Atl. Rep. 281.

[365] Bigelow v. Leibby, 117 Mass. 359; Hope Mut. Ins. Co. v. Weed, 28 Conn. 51.

[366] Sands v. Lilienthal, 46 N. Y. 541. See, also, Smith v. Bell, 107 Pa. St. 352.

CHAPTER XXXIII.

NOTICE — PREMIUMS, ASSESSMENTS, AND DUES.

§ 1320. When notice must be given—Generally.
§ 1321. When notice need not be given—Generally.
§ 1322. Failure to give written notice, tender unnecessary.
§ 1323. Statutory notice.
§ 1324. Stipulation contrary to statute requiring notice.
§ 1325. Constitutionality of statute requiring notice.
§ 1326. To what class of policies New York statute applies.
§ 1327. Stipulation in guaranty fund note as to notice.
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§ 1329. Sufficiency of statutory notice.
§ 1330. Authorities holding notice sufficient.
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§ 1335. Personal notice—Whether notice must be actually received.
§ 1336. Service by mail.
§ 1337. Notice wrongly addressed.
§ 1338. Notice by publication.
§ 1339. Computation of time.

§ 1320. When Notice Must be Given—Generally.—In life insurance the continuance of the contract is generally made dependent upon the payment at stipulated times of a premium which is fixed and certain, and the amount of which is known by the insured, so that unless the contract so provides, or notice be required by law or usage, or a course of dealing, no notice is necessary. But it is usually conditioned that notice of assessments shall be given, or the plan of insurance may be such that the assured cannot know the amount he will be called upon to pay unless notified thereof. If, however, the contract provides for notice of the time of payment of the premium or of the assessment or of dues, such notice is a condition precedent to the exercise of the company's right to

claim a forfeiture or to suspend a member for nonpayment.[1] Thus, the notice prescribed by the charter or by-laws must be given,[2] and if the by-laws provide that notice of annual dues shall be given the member a certain number of days before they become due, such notice is necessary to establish a forfeiture, even though the certificate provides for forfeiture.[3] And the notice must be reasonably in accord with the provisions of the contract, and the company must notify the member with reasonable certainty what he must do within the time specified for payment, for the party is entitled to such notice as his contract calls for, and a forfeiture cannot be based upon a notice of claims for dues in advance contrary to the terms of the agreement.[4] So notice of assessment should be given when made, and not before.[5] It is held, however, in New York that notice may be given in advance of the time when the premium becomes due.[6] The fact that the assessment has been legally and properly made cannot aid the company to claim a forfeiture if it has neglected to give notice if required.[7] The stipulation in the contract may be such as to require notice

[1] Mandego v. Continental Mut. Assn., 64 Iowa, 134; Supreme Lodge K. of H. v. Dalberg, 138 Ill. 508; 28 N. E. Rep. 785; Lewis v. Phœnix Mut. L. Ins. Co., 44 Conn. 72; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544 (this was a case of life insurance; the stipulation was for forfeiture for nonpayment of premium on day specified; the question of notice was not in issue); Union etc. Ins. Co. v. Pottker, 33 Ohio St. 459; Columbia Ins. Co. v. Buckley, 83 Pa. St. 298; Grand Mut. L. Ins. Co. v. New York Mut. L. Ins. Co., 97 Pa. St. 15; Smith v. National L. Ins. Co., 103 Pa. St. 117; Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 250; Seibert v. Chosen Friends, 23 Mo. App. 268; Wachtel v. Benevolent Soc., 84 N. Y. 28; Supreme Lodge K. of H. v. Johnson, 78 Ind. 110; Robert v. New England etc. Ins. Co., 1 Disn. (Ohio) 355; Thompson v. Insurance Co., 104 U. S. 252, and cases cited throughout this section.

[2] Pulford v. Fire Dept. etc., 31 Mich. 458; Supreme Lodge Knights of Honor v. Dalberg, 138 Ill. 508; 28 N. E. Rep. 785.

[3] Garretson v. Equitable M. L. & E. Assn. (Iowa, 1895), 61 N. W. Rep. 952. See Mutual Endowment Assur. Assn. v. Essender, 59 Md. 463.

[4] Mutual Endowment Assur. Assn. v. Essender, 59 Md. 463.

[5] Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

[6] Phelan v. Northwestern Mut. L. Ins. Co., 42 Hun (N. Y.), 419. But see s. c., 113 N. Y. 147.

[7] Frey v. Mutual Ins. Co., 43 U. C. Q. B. 102.

by the secretary,[8] and actual notice of an assessment may be required under the articles of association, even though a by-law provides for notice by publication,[9] and notice of an assessment is a condition precedent to an action.[10] The obligation to give notice before striking a member's name from the rolls for nonpayment of arrears in dues is not excused by such member's neglect to notify the society of a change in his address where the by-laws provide for such notice, and for a fine in case of the member's failure to notify the society of a change of address.[11] And if the constitution makes nonpayment within a specified time to operate of itself as a forfeiture, notice of death assessments must be given.[12] So where notice is required to be given the local subordinate lodge, it must be given as provided, and the members must be notified by the lodge, for mere notice to such local agents is not constructive notice to the members.[13] A member may be entitled to a notice from both the local and general secretary before a forfeiture can be declared if the by-law so provides, expressly or by construction.[14] If the amount of the premium is uncertain on account of dividends, and the insured is dependent upon notice for knowledge of the sum due, which notice the company has been accustomed to give, or if the times and amounts of assessments depend upon the mortality of members, or the amount assessable for a loss is uncertain, an obligation rests upon the company to give notice as a condition precedent to forfeiture or suspension, or the depriving a member of good standing, and the failure to pay through the fault

[8] Bates v. Detroit Mut. etc. Co. 51 Mich. 587.

[9] Schmidt v. German Mut. Ins. Co. of Indiana, 4 Ind. App. 340; 30 N. E. Rep. 939; Supreme Lodge Knights of Honor v. Dalberg, 138 Ill. 508; 28 N. E. Rep. 785.

[10] Williams v. Babcock, 25 Barb. (N. Y.) 109; Columbia Ins. Co. v. Buckley, 83 Pa. St. 293.

[11] Wachtel v. Widows & Orphans' Soc., 84 N. Y. 28.

[12] Scheufler v. Grand Lodge A. O. U. W., 45 Minn. 256; 20 Ins. L. J. 241; 47 N. W. Rep. 799.

[13] Hall v. Supreme Lodge K. of H., 24 Fed. Rep. 450; Coyle v. Kentucky Grangers' Mut. B. Assn. (Ky.), 2 S. W. Rep. 676.

[14] Payn v. Mutual Relief Soc., 17 Abb. N. C. (N. Y.) 53; 6 N. Y. St. Rep. 366.

or otherwise of those obligated to send notice, does not affect the holder's or member's rights.[15] When notice is a condition precedent to payment of an assessment on time, its validity must be affirmatively alleged and proven; an allegation that legal notice was duly given is insufficient.[16]

§ 1321. When Notice Need not be Given—Generally. As stated in the last section, in life insurance contracts no notice is, as a rule, required, in the absence of some statute or usage or some contract stipulation,[17] even though the assured had no actual knowledge, owing to his neglect to take the policy up from the company's agent, of a condition for forfeiture for nonpayment at a specified time of the premium.[18] But if the charter or by-laws require interest on the deposit notes of members to be paid annually on or before a certain time, and that no loss will be paid by the company while such interest remains due and unpaid, and there is nothing in the charter

[15] Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; 29 Am. Rep. 200; Phœnix L. Ins. Co. v. Foster, 106 U. S. 30; Castner v. Farmers' Ins. Co., 50 Mich. 273; 15 N. W. Rep. 452; Insurance Co. v. Eggleston, 96 U. S. 572; Covenant Mut. etc. Soc. v. Spies, 114 Ill. 463; Mayer v. Mutual L. Ins. Co., 38 Iowa, 304; Attorney General v. Continental L. Ins. Co., 33 Hun (N. Y.), 138; Farrie v. Supreme Council. 15 N. Y. St. Rep. 155; Union Central Ins. Co. v. Pottker, 33 Ohio St. 459; Gellatly v. Mutual B. etc. Soc., 27 Minn. 215; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156; Agnew v. A. O. U. W., 17 Mo. App. 254.

[16] Coyle v. Kentucky Grangers' etc. Mut. B. Assn. (Ky.). 2 S. W. Rep. 676. In this case the appellee alleged that the appellant refused and failed to pay the sum required within ten days after legal notice of the death of one of the members of the society, and there were similar allegations in reference to failure and refusal to pay other assessments, and the court said: "These allegations are not an averment of facts. The answer should have averred affirmatively the facts showing that the precedent conditions above indicated to the liability of Coyle for the payment of his dues or assessments had been complied with by the society; failing in this it is clearly defective." See, also, Supreme Lodge Knights of Honor v. Dalberg, 138 Ill. 508; 28 N. E. Rep. 785; Siebert v. Chosen Friends, 28 Mo. App. 272; Baxter v. Brooklyn L. Ins. Co., 44 Hun (N. Y.), 184; Supreme Lodge K. of H. v. Johnson, 78 Ind. 110.

[17] Security L. Ins. Co. v. Gober, 50 Ga. 404. See cases cited under first note of the last section.

[18] Security L. Ins. Co. v. Gober, 50 Ga. 404.

requiring notice of the amount due and the time when due, no notice is required;[19] and unless notice is required of the times of payment and amount of dues, no notice thereof will be given.[20]

§ **1322. Failure to Give Written Notice—Tender Unnecessary.**—If a written notice by the insurer's president states that notice will be given of the time when premiums will be due, and no notice is given, a tender of premiums due after the surrender of a policy fraudulently obtained is not necessary under an action to revive the policy.[21]

§ **1323. Statutory Notice.**—If the statute requires that the company give notice of the time of payment of premiums or assessments to the holders of policies or certificates, such notice must be given, and conformity with the provisions of the statute as to the kind of notice and the mode of service of the same is a condition precedent to the enforcement of a forfeiture for nonpayment.[22] And if the company assures the holder of a policy issued before the passage of such an act that the notices required will be given, compliance therewith is necessary,[23] and if the statute provides that there shall be no forfeiture until thirty days after service of such

[19] Mutual F. Ins. Co. v. Miller Lodge, 58 Md. 463.

[20] Mutual Endowment Assur. Assn. v. Essenden, 59 Md. 563, per the court. See cases under first note to the last section.

[21] Heinlein v. Imperial L. Ins. Co., 101 Mich. 250; 25 L. R. Annot. 627; 59 N. W. Rep. 615.

[22] Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15; 17 N. E. Rep. 396; 12 Cent. Rep. 756; N. Y. Laws, 1876, c. 341 (repealed, see sec. 1324, herein); McDougal v. Provident Sav. L. Assur. Soc. of New York, 64 Hun (N. Y.), 515; 19 N. Y. Supp. 481; Baxter v. Brooklyn L. Ins. Co., 119 N. Y. 450; 44 Hun (N. Y.), 184; 29 N. Y. St. Rep. 592; 23 N. E. Rep. 1048; N. Y. Laws, 1877, c. 321 (repealed, see sec. 1324 herein); Marsden v. Hotel Owners' Ins. Co. (Iowa, 1892), 52 N. W. Rep. 509; Acts 18th Gen. Assem. Iowa, c. 210 (case of assessments); Phelan v. Northwestern Mut. L. Ins. Co., 113 N. Y. 147; 42 Hun (N. Y.), 419; 20 N. E. Rep. 827; Laws N. Y. 1877, c. 321 (repealed, see sec. 1324 herein), and see note 35 under sec. 1326 herein.

[23] Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15; 17 N. E. Rep. 396; 12 Cent. Rep. 756.

notice, the thirty days must be allowed.[24] But it is held that the statute of New York of 1876, amended in 1877, requiring notice of the times of payment of dues and premiums, does not apply to mutual benefit associations,[25] nor to policies issued upon monthly or weekly installments of premiums.[26] So the requirements of the New York statute as to notice to assured before forfeiture can be declared for nonpayment of premiums under a life risk, only applies to New York companies doing business in that state, and not to said companies issuing policies in other states,[27] and where the statutory notice is not given of a premium owing at the time of the death of the insured, neither payment nor tender is required to warrant a recovery.[28] If the policy provides for the payment of annual premiums, and also of mortality assessments, it is held that the statutory notice as a condition precedent to forfeiture applies only to premiums or interest payable at stated intervals, and not to mortality assessments.[29] If the contract and all matters relating to its performance are governed by the laws of the state of New York, then the fact that the application was made and signed and delivered in another state does not release the insurer from the obligation to give said statutory notice before declaring a forfeiture for nonpayment of premiums, even though the policy contains a waiver of any other notice than that under the terms of the policy.[30] A statute which provides that notice of assessments may be given by

[24] Phelan v. Northwestern Mut. L. Ins. Co., 113 N. Y. 147. See s. c., 42 Hun (N. Y.), 419; 20 N. E. Rep. 827.

[25] Ronald v. Mutual Reserve Fund L. Assn., 132 N. Y. 378; 44 N. Y. St. Rep. 407; 30 N. E. Rep. 739.

[26] Merryman v. Keystone Mut. B. Assn., 63 Hun (N. Y.), 635; 18 N. Y. Supp. 305; 44 N. Y. St. Rep. 797.

[27] Griesemer v. Mutual L. Ins. Co. (Wash. 1895), 38 Pac. Rep. 1031; Laws N. Y. 1877, c. 321 (repealed, see sec. 1324, herein; see note 35 under sec. 1326, herein).

[28] Baxter v. Brooklyn L. Ins. Co., 119 N. Y. 450; 44 Hun (N. Y.), 184; 23 N. E. Rep. 1048.

[29] So held in Merriman v. Keystone Mut. B. Assn., 138 N. Y. 116; 51 N. Y. St. Rep. 665; 63 Hun (N. Y.), 635; under Stats. N. Y. 1877, c. 321 (repealed, Hamilton's Stats. Rev. 1894, c. 690, sec. 1324, and note 35 under sec. 1326, herein).

[30] Phinney v. Mutual L. Ins. Co. (U. S. C. C. 1895), 67 Fed. Rep. 493.

"publication or otherwise," is not unconstitutional as not requiring personal notice.[31]

§ 1324. Stipulation Contrary to Statute Requiring Notice.—If the statute requires that notice of the accruing of premiums be given assured by the company, such statutory conditions rest on public or general policy, and cannot be waived by assured, even though for his benefit.[32] So in California it is held that if a statute declares that no life insurance company shall have the power to declare forfeited or lapsed any policy by reason of nonpayment of premiums unless notice be given as required by statute, it is held that any contract stipulating to the contrary is void, since the statute indicates the legislative will that as a matter of public policy life insurance corporations shall be deprived of the power to declare forfeited policies of insurance for the nonpayment of premiums, except in the prescribed statutory mode, and a waiver on the part of assured cannot be held to confer a power which the statute has taken away.[33]

§ 1325. Constitutionality of Statute Requiring Notice.—The statutory requirement imposed upon insurance companies that they give notice of the time of the accruing of premiums does not violate the constitution of the United States, as not affording equal protection of the laws to companies of the state of enactment of said statute, or to companies of other states doing business in said state.[34]

§ 1326. To what Class of Policies New York Statute Applies.—The New York statute providing for notice of maturity of premiums as a condition precedent to forfeiture

[31] Hamilton etc. Ins. Co. v. Parker, 11 Allen (Mass.), 574; Mass. Stats. 1862, c. 181, sec. 2; Stats. 1863, c. 249.

[32] So held in Phinney v. Mutual L. Ins. Co. (U. S. C. C. 1895), 67 Fed. Rep. 493.

[33] Griffith v. New York L. Ins. Co., 101 Cal. 627; 40 Am. St. Rep. 96; 36 Pac. Rep. 113. But see Laws N. Y. 1885, c. 328, sec. 1, which provides for waiver in certain classes of policies.

[34] Phinney v. Mutual L. Ins. Co. (U. S. C. C. 1895), 67 Fed. Rep. 493.

for nonpayment thereof applies to policies issued by a company providing for the payment of a specified sum solely from the funds accumulated from payments of its insured, and that if such accumulation is insufficient, then an assessment shall be made on contracts in force, and that if the assessment fund and accumulations are insufficient to satisfy all claims, then a distribution pro rata shall be made.[35]

[35] Jacklin v. National L. Assn. (N. Y. S. C. 1893), 24 N. Y. Supp. 746: Laws N. Y. 1876, c. 341, sec. 1 (repealed, see sec. 1324, herein), Amended Laws 1877, c. 321 (repealed, see sec. 1324, herein). See Laws N. Y. 1885, c. 328, sec. 1, which provides for waiver in certain classes of policies. The Laws of New York (1892, c. 690, art. 2, sec. 92, as amended in 1893 and 1894, Hamilton's Stat. Rev. 1894, p. 51), provide: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest, or installment, or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five, days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited, or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." The Laws of New York, 1892, c. 690, art. 7, sec. 238, as amended, 1893 and 1894, Hamilton's Stat. Rev. 1894, p. 108, provide: "All notices of as-

§ **1327. Stipulation in Guaranty Fund Note as to Notice.**—It is obligatory upon a contributor to pay assessments within a specified time after notice of its levy, or he must forfeit prior payments where a guaranty fund note so stipulates.[36]

§ **1328. Sufficiency of Notice.**—In determining the sufficiency of a notice, reference must always be had to the contract with what it includes. The requirements of the charter and by-laws must be followed, in so far as they contain provisions relating to the character or contents of the notice, the time and mode and service, the amount payable, or any other material matter relating to its sufficiency. The rule should also be constantly considered that forfeitures are not favored, and rights, the deprivation of which depend upon notice, will be guarded by the courts to the extent of enforcing compliance with the requirements of the contract, the charter, and by-laws as to the notice of all material matters relating thereto. If a party stipulates in a contract with the association for the manner and mode of notice, a mere rumor or information from a third party of the fact which the notice concerns does not constitute notice of such fact, nor is it such knowledge thereof as obligates him to act thereupon at his peril, or to reasonably put him upon inquiry.[37] A notice to assured of the amount claimed to be due from him for premiums must be exact, and if it specifies a sum greater than the insurer is entitled to exact, the failure to pay does not work a forfeiture.[38] And if the by-laws require that the notice shall

sessment made on its lodges, councils, branches, or members, or any of them, by such society, order, or association, shall truly state the cause and purpose of the assessment, and what portion or amount thereof, if any, is to be used for the payment of other than beneficiary claims." Sections 233 and 239 of the same statute specify what societies, orders, and associations shall be subject to the provisions of article 7. Article 10 of the same chapter, section 290, and schedule annexed, specify what laws and portions thereof are repealed.

[36] Berry v. Anchor Mut. F. Ins. Co. (Iowa, 1895), 62 N. W. Rep. 681.

[37] Siebert v. Chosen Friends, 23 Mo. App. 268, per the court.

[38] So held in Eddy v. Phœnix Mut. L. Ins. Co., 65 N. H. 27; 23 Am. St. Rep. 17.

include a list of deaths since the last notice, this must be done; so also where it requires the amount due to the benefit fund to be stated, it must appear therein.[39] Nor should the notice require the payment of more than the agreement calls for.[40] A notice which is admitted to inform insured that an assessment will be due on a certain date, there being no evidence of any other notice, does not show an election on the part of the company to cancel the contract, nor will such notice forfeit or terminate the policy.[41] A notice must be signed by the person by whom it is required to be given; thus, a notice is insufficient, which is filled up and addressed by the local secretary, and upon which the name of the general secretary is printed, only where the by-laws provide for notice of an assessment by the former, and a forfeiture upon failure to pay after notice from the latter.[42] And a notice may be inoperative for uncertainty; as where, in the absence of evidence of any rule in the charter or by-laws on the subject, a notice of an assessment by a receiver on deposit notes specified different rates for small notes and large notes, but did not show the class to which any note belonged, it was held void.[43] So the company is bound by the act of its secretary in sending notice.[44] If the stipulation is for the payment of quarterly dues, a notice is insufficient which calls for the payment of annual dues in advance.[45] If the member is required under the notice to pay an assessment before the stipulated contract time for payment, such notice is invalid.[46] And a notice by a receiver which is published before the assessment is ascertained, and which does not give information to each member of the amount he is to pay, is irregular and deceptive.[47] A notice is insufficient to sustain a forfeiture which

[39] Miner v. Michigan Mut. B. Assn., 63 Mich. 338; 29 N. W. Rep. 852.

[40] Mutual Endowment Assn. v. Essender, 59 Md. 463.

[41] See Fenster v. Merchants' & B. Ins. Co. (Iowa, 1896), 65 N. W. Rep. 1004.

[42] Payne v. Mutual Relief Soc., 17 Abb. N. C. (N. Y.) 53. See s. c. 6 N. Y. St. Rep. 366.

[43] Bangs v. Duckinfield, 18 N. Y. 592.

[44] Olmstead v. Farmers' Mut. etc. Soc., 50 Mich. 200.

[45] Mutual Endowment etc. Assn. v. Essender, 59 Md. 463.

[46] Frey v. Wellington Mut., 4 Ont. 293.

[47] Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

is published for a less number of days than is required.[48] If the assured has deposited in advance for assessments, and there is an excess in his favor, the company must give notice of the correct amount which insured is required to pay, and notice of the full amount is not sufficient notice on which to base a forfeiture.[49] The fact that the assessment was properly levied will not validate a notice, defective in itself.[50] It is held, however, that courts will be liberal in determining what amounts to notice,[51] and that the question of due and sufficient service of notice is for the jury.[52]

§ **1329. Sufficiency of Statutory Notice.** — If the form, time, and manner of notice be prescribed by statute, it must be complied with, especially if a forfeiture is to result from the neglect, of the party entitled to notice, to do some act to which the notice relates. Thus, a notice, the phraseology of which is not as clear as the language of the statute, is insufficient.[53] And it may be generally stated that if a notice required by statute to be sent insured under a life risk before the policy can be forfeited for nonpayment of premiums is insufficient, because of nonconformity to the statutory requirements, it will not enable the company to

[48] Sande v. Groves, 58 N. Y. 94; Fitzpatrick v. Mutual B. etc. Soc., 25 La. Ann. 443.

[49] United States Mut. Acc. Assn. v. Mueller, 151 Ill. 254; 37 N. E. Rep. 882.

[50] Frey v. Mutual F. Ins. Co., 43 U. C. Q. B. 102.

[51] Hollister v. Quincy Mut. Ins. Co., 118 Mass. 478.

[52] Buckley v. Columbia Ins. Co., 83 Pa. St. 298.

[53] "Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void' conveys a meaning easily to be comprehended. To refer to a policy and conditions, and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing, and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute, and does not embody the notice which the statute requires": Per Danforth, J., in Phelan v. Northwestern M. L. Ins. Co., 113 N. Y. 147; 20 N. E. Rep. 827.

claim a forfeiture.[54] And in serving a notice care should be taken that it be done in conformity with the special law of the notice which prescribes the form and manner in which it is to be given.[55] It is held that the form prescribed by statute must be followed, and that a notice the phraseology of which is not as clear as the language of the statute is insufficient.[56] Under the laws of Iowa a notice of the nonpayment of premium will not terminate the liability of the insurer, unless it states "that unless payment is made within thirty days the policy will be suspended." A notice that the sum unpaid must reach the office not later than the date thereof does not comply with the statute.[57] If the statute provides specifically that the notice shall state, among other things, that "such policy and all payments thereon will become forfeited and void" for nonpayment of the premium, a notice is insufficient which fails to so state.[58] So also is a notice insufficient where it does not state, as required, that "if not paid the policy and all payments thereon will become for-

[54] Griesemer v. Mutual L. Ins. Co. (Wash. 1895), 38 Pac. Rep. 1031; Laws N. Y. 1877, c. 321.

[55] Siebert v. Chosen Friends, 23 Mo. App. 272, per the court.

[56] Phelan v. Northwestern Mut. L. Ins. Co., 113 N. Y. 147; 20 N. E. Rep. 827. But see Phelan v. Northwestern Mut. L. Ins. Co., 42 Hun (N. Y.), 419.

[57] Marden v. Hotel Owners' Ins. Co., 85 Iowa, 584; 39 Am. St. Rep. 316.

[58] Merryman v. Keystone Mut. B. Assn., 63 Hun (N. Y.), 635; 44 N. Y. St. Rep. 797; 18 N. Y. Supp. 305. In this case the court said, per Macomber, J.: "The notice which is now relied upon to work a most unconscionable forfeiture does not conform to this statutory requirement. . . . . It failed: 1. To notify the insured that all payments made thereon would become forfeited; and 2. It failed to notify the assured that the policy would be void. Having regard for the intelligence and technical knowledge of the class of persons to whom such insurance is most attractive, we are unable to say that the notice, as actually served, conveyed any such idea to the assured. We content ourselves by holding that it did not necessarily convey such idea, and that the assured might, and probably did, understand from its language that before he could be actually deprived of the benefit of the policy some step would be necessary to be taken by the company, and that such action might, and probably would, involve the repayment to him of the premiums and mortuary assessments already disbursed by him."

feited and void," although the notice given specifies that it will be necessary to pay the premiums on or before the specified date as stipulated, and that "this notice is given to meet the requirement of the" statute.[59]

§ **1330. Authorities Holding Notice Sufficient.**—It is held that a notice may be sufficient although it shows the assessment to have been levied by the society, instead of the board of directors.[60] And where the provisions of the constitution relating to the time of sending notice are merely directory, notice need not be sent on the exact day; as in case the provision is that notice shall be sent not later than the eighth day of the month, and it is sent on the twelfth.[61] So it is held that the fact that the notice is merely technically defective in form is immaterial, provided the member actually receives notice, as in case where it has only a fac simile of the seal of the lodge thereon.[62] And if the form of notice is not

[59] McDougal v. Provident Sav. L. Assur. Soc. of New York, 64 Hun (N. Y.), 515; 19 N. Y. Supp. 481; Elmer v. Mutual B. L. Assn. of America, 64 Hun (N. Y.), 639; 19 N. Y. Supp. 289.

[60] Williams v. German Mut. etc. Soc., 68 Ill. 289.

[61] Benedict v. Grand Lodge A. O. U. W., 48 Minn. 471; 51 N. W. Rep. 371; 21 Ins. L. J. 438. The constitution in this case provided that "written notices of assessments shall be made and sent by the financier not later than the eighth day of the month in which the notice was issued by the grand recorder." The court said in reference to this provision: "It is contended on the part of the plaintiff that the provisions of the constitution as to the times for making assessments and sending notices thereof must be construed, and effect be given to them exactly according to their terms; in other words, that a notice is ineffectual to impose upon a member the duty to pay an assessment, a neglect of which duty may result in a forfeiture of his rights, unless the notice be given on or before the eighth day of the month; and further, that the requirement of the constitution is not complied with if notice is given only by mail. As to the time within which notices are to be sent, the express provision of the constitution must be deemed to be only directory, and not a limitation upon the right and duty to notify members of assessments made, or accordance with the plaintiff's contention would be plainly opposed to, and would often defeat, one of the principal purposes of the organization, and would be unsupported by any apparent reason, save the bare language of the constitution above recited."

[62] Karcher v. Supreme Lodge, 137 Mass. 368. "The plaintiff here objects that this notice was invalid, because it contained only a

prescribed, mere informalities, such as signing the notice and want of address to the member on the notice, do not make it insufficient where it is actually received by the member in an envelope properly addressed to him, and the notice is otherwise valid.[63] So if it appears that the member entitled to notice had actual knowledge that the assessment had been made, and had stated that he intended to pay it, there is a question for the jury whether he had notice.[64] So it is decided that the notice is sufficient although it fails to specify the amount due on each note;[65] so also though it be mailed by another than the officer designated to give the notice.[66] And actual notice by a receiver has been held sufficient.[67] So if the notice specify only the rate per cent, it is declared sufficient.[68]

§ **1331. To Whom Notice Should be Given.**—Where notice as to premiums and assessments is required, it should be given to the assured or the member, but if another, as in case of an assignee for value who has, with the company's consent, assumed the obligation to pay, or has become a member, and is consequently liable, such party should be notified.[69] But notice need not be given to a voluntary assignee, he being a

printed fac simile of the seal of the lodge, and the constitution of the defendant required that it be under the seal of the lodge. The provisions of the constitution are not fully set out, and we are, therefore, unable to determine whether by the constitution the presence of the seal is made anything more than a matter of form, or whether by the true construction of the constitution a printed fac simile of the seal is not what was intended. There is no evidence that Karcher was misled by the notice, or that it was not in all respects as effectual in giving him information as if it had contained an actual impression of the seal of the lodge. So far as appears, this defect in the notice, if it was a defect, was immaterial," per Field, J.

[63] Hansen v. Supreme Lodge K. of H., 140 Ill. 301; 29 N. E. Rep. 1121.

[64] Siebert v. Chosen Friends, 23 Mo. App. 268.

[65] Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252.

[66] Payne v. Mutual Relief Soc., 17 Abb. N. C. (N. Y.) 53; 6 N. Y. St. Rep. 365.

[67] Cooper v. Shaver, 41 Barb. (N. Y.) 151.

[68] Bangs v. Duckinsfield, 18 N. Y. 592.

[69] Examine Brannin v. Mercer Co. Mut. Ins. Co., 28 N. J. L. (4 Dutch.) 92. See preceding chapter as to who are liable to assessments, etc.

stranger to the contract.[70] Notice of premiums due may be given to the husband where he has taken out a policy on his life for his wife's benefit;[71] and though the by-laws require that the society shall notify its members through its local agents or subordinate lodges, it would be unreasonable and unjust to hold mere constructive notice to such local agents sufficient; they must be notified, and in time notify the members.[72]

§ 1332. Cases Holding that Usage to Send Notice Necessitates Giving Notice.—If a life insurance company has been in the practice of notifying the insured of the time when the premium will fall due, and of the amount, and the custom has been so uniform and so reasonably long in continuance as to induce the insured to believe that a clause for forfeiture for nonpayment will not be insisted on, but that the notice will precede the insistence upon the forfeiture, and the insured is in consequence put off his guard, such notice must be given, and if not given no advantage can be taken of any default in payment which it has thus encouraged, for the insured is entitled to expect the customary notification; and to mislead the insured by not giving such notice, and then insist upon a strict compliance with the conditions of forfeiture, constitutes, under such circumstances, a fraud upon the assured which the courts have refused in numerous cases to countenance.[73] So it is held that it is a question for the jury

[70] Lycoming F. Ins. Co. v. Storrs, 97 Pa. St. 354.

[71] Whitehead v. N. Y. L. Ins. Co., 102 N. Y. 143.

[72] Coyle v. Kentucky Grangers' Mut. B. Soc. (Ky.), 2 S. W. Rep. 676.

[73] Holme v. Philadelphia L. Ins. Co., 61 Pa. St. 107; 100 Am. Dec. 621; Insurance Co. v. McCain, 96 U. S. 84; Attorney General v. Continental L. Ins. Co., 33 Hun (N. Y.), 138; Seamans v. Northwestern Mut. L. Co., 3 Fed. Rep. 325; Mayer v. Mutual L. Ins. Co., 38 Iowa, 304; 18 Am. Rep. 34; Insurance Co. v. Wolff, 98 U. S. 326; Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459; 31 Am. Rep. 555; Thompson v. Insurance Co., 52 Mo. 469; New York L. Ins. Co. v. Eggleston, 96 U. S. 572; Insurance Co. v. Sefton, 53 Ind. 380; Insurance Co. v. Pierce, 75 Ill. 426; Brooklyn L. Ins. Co. v. Bledstone, 25 Ala. 538; Illinois Ins. Co. v. Stanton, 57 Ill. 351; Sullivan v. Industrial B. Assn., 73 Hun (N. Y.), 319; 26 N. Y. Supp. 186; Grant v. Alabama Gold L. Ins. Co., 76 Ga. 575; Meyer v. Knickerbocker Ins. Co., 51 How. Pr. (N. Y.)

whether there has been a forfeiture where it has been the custom of the company to give three notices, one at the time of the assessment, one thirty, and one sixty days thereafter, and but one notice is given, the assured having promised shortly thereafter to fix the matter up, and having subsequently corresponded with the company and made another like promise after a small loss had accrued.[74] Again, where the assured had been accustomed to receive notice of the time when premiums fell due, and he changed his residence and notified defendant's agent of the fact, but notice of the next premium falling due was sent to his former residence, and consequently he failed to pay the premium on the day, it was held in an action on the policy that the defendants were bound by their custom to give notice, and could not set up such nonpayment where no notice had been given as a forfeiture of the policy.[75] So if the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder through a local agent residing in his neighborhood, this mode of collection cannot be discontinued and payment required at the company's office without notice to the insured;[76] and it is held in other cases that a continued custom to give notice cannot be discontinued without notice,[77] and that a payment within a reasonable time after the premium becomes due is sufficient where the custom has been to send notice and none is given.[78] And it is held that the society is bound by a long-continued custom as to the manner of giving notice, although the by-law

263; Bradwell v. Insurance Co., 75 N. C. 8; Dillebar v. Knickerbocker L. Ins. Co., 76 N. Y. 567; 7 Daly (N. Y.), 540; Hanley v. Life Assn., 69 Mo. 380; Lewis v. Phœnix Ins. Co., 44 Conn. 72.

[74] Elmondorph v. Citizens' Mut. Ins. Co., 91 Mich. 36; 51 N. W. Rep. 926.

[75] Mayer v. Mutual L. Ins. Co., 38 Iowa, 304; 18 Am. Rep. 34.

[76] Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459; 31 Am. Rep. 555.

[77] Meyer v. Knickerbocker Ins. Co., 51 How. Pr. (N. Y.) 263; 73 N. Y. 516; 29 Am. Rep. 200; Phœnix Ins. Co. v. Doster, 106 U. S. 30; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

[78] Grant v. Alabama Gold L. Ins. Co., 76 Ga. 575.

provides for a special mode of giving notice,[79] and a uniform custom of the company to give notices of assessments and to collect the same through a resident agent cannot be discontinued without notice.[80]

§ 1333. Authorities Holding the Contrary Doctrine. Opposed, however, to these decisions are those of several courts wherein the contrary doctrine is held; thus, it is decided that if the custom to send notice that dues are payable is merely voluntary on the part of the insurer, failure to give notice does not waive a condition as to forfeiture for nonpayment thereof on the specified day,[81] also that such custom is a mere matter of indulgence, and the insured may not legally insist upon its continuance.[82] And it is held that the fact that the exact

[79] Gunther v. New Orleans Cotton Exch. Mut. Aid Assn., 40 La. Ann. 776; 5 S. Rep. 65.

[80] White v. Connecticut Ins. Co., 120 Mass. 330; Insurance Co. v. Bernard, 33 Ohio St. 459.

[81] "The claim that there was a waiver of the conditions of the policy is based on the following propositions: 1. That fifteen days before the annual dues were payable, according to the terms of the policy, the defendant caused a notice to be sent to the assured, reminding her of the day when such dues became payable. Conceding that this had been the custom of the defendant, it was a voluntary act on its part, and was not required by the terms of the policy. The obligation to pay the annual dues on a named day was as positive as if the assured had given her promissory note to that effect. The fact that the defendant voluntarily sent such notice to the persons insured, and that in this instance it was, as is claimed, negligent in sending the notice to the proper place, cannot amount to a waiver of the condition of the policy," per Seevers, J.; Mandego v. Centennial Mut. L. Ins. Assn., 64 Iowa, 134; 17 N. W. Rep. 656; 19 Ins. L. J. 660; New York L. Ins. Co. v. Statham, 93 U. S. 24.

[82] "In order to make the contention good, it must be shown that there was an obligation on the part of the company to give the notice, and that the giving of such notice was a condition precedent to the right of the company to receive the interest on the premium note, according to the contract of insurance. But, as we have seen, this obligation is not created by the charter or by-laws of the company, and we think it clear that there is nothing in the habit or usage relied on that could impose such duty upon the company, with such consequence of failure to perform it as that contended for by the appellee": Mutual F. Ins. Co. v. Miller, 58 Ind. 463, per Alvey, J. "The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stim-

times and amounts of payments is known to the assured will permit a discontinuance of a custom to send notice, without notifying the insured of the change;[83] and that evidence that the company has been in the habit of notifying the insured when his premiums are due, but has neglected to do so in the particular instance in question, is inadmissible, unless it be shown that the notice was purposely omitted with the design to work a forfeiture.[84] And the failure to give the customary notice as to the payment of annual interest on premium notes does not excuse default in payment of the same when due, while the policy provides for forfeiture on such default.[85]

§ **1334. Same Subject—Conclusion.**—The better opinion would seem to be that evidenced by the cases which hold that a usage which is uniform and reasonably long-continued, whereby the insured has been induced to believe that the rule as to forfeiture will not be strictly insisted on, but that the company will continue its custom to give notice as to the times when the premium will become due, or notify the insured of the discontinuance of such custom. This rule is but fair and just to all parties, and to hold that evidence is inadmissible of such a custom between the parties is to reject evidence showing any subsequent modification by the parties of the contract, as well as evidence of waiver; but it is without doubt competent for the parties to modify subsequently the terms of

ulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not": Thompson v. Insurance Co., 104 U. S. 252, per Bradley, J. "It is contended that the failure of the defendant company to send the customary notice excused the plaintiff's default. By the terms of the contract it was certainly the duty of the assured to pay on the day stipulated, whether he received notice or not; he knew, or was bound to know, the several dates at which the premiums were due, and his neglect to pay was at his own peril; the company was under no obligation to give the notice": Smith v. National L. Ins. Co., 103 Pa. St. 177, per Clark, J.

[83] Thompson v. Insurance Co., 104 U. S. 252.

[84] Grand L. Ins. Co. etc. Co. v. New York Mut. L. Ins. Co., 97 Pa. St. 15.

[85] Webb v. Baltimore Co. Mut. F. Ins. Co., 63 Md. 213.

their contract, or for either party to waive a provision in the contract which is for his benefit.[86]

§ **1335. Personal Notice—Whether Notice Must be Actually Received.**—Unless there is some requirement to the contrary, a personal notice is sufficient, and where notice is required and no mode is provided, a personal notice is necessary, unless the same purpose may be otherwise accomplished.[87] And if a notice is relied on, it must be shown to have been actually received, unless the contract stipulates otherwise,[88] or unless the statute provides that properly mailing is sufficient.[89] And personal notice is insufficient if the by-laws prescribe some other mode.[90] So actual notice by the receiver before bringing action may be sufficient, although notice by publication is required.[91] But the question whether the notice, when required to be given, must be actually received by the party to whom it should be given, must depend upon the provisions, statutory or otherwise, concerning giving notice. Thus, if the charter, articles of associations, or by-laws, or, in brief, the contract provides that the mode of transmission shall be by mail, actual receipt of the notice need not be proven; it is sufficient that the same is properly addressed and mailed in such a manner that it would ordinarily be received in due course of mail.[92] So notice of an assessment need not be received by

[86] See c. xxxiv, herein, on waiver and estoppel. But as to waiver of statutory notice, see sec. 1324, herein.

[87] Wachtel v. Widows & Orphans' Soc., 84 N. Y. 28; York Co. Mut. Ins. Co. v. Knight, 48 Me. 75; Schmidt v. German Mut. Ins. Co. of Indiana, 4 Ind. App. 340; 30 N. E. Rep. 939; Jones v. Sisson, 6 Gray (Mass.), 288.

[88] So held in Merriman v. Keystone Mut. B. Assn., 138 N. Y. 116; 44 N. Y. St. Rep. 797; 51 N. Y. St. Rep. 665; 63 Hun (N. Y.), 635.

[89] See sec. 1324, c, note N. Y. St. Rep. Stats., and note 35, under sec. 1326, herein.

[90] Northampton Livestock Ins. Co. v. Stewart, 39 N. J. L. 486; Sands v. Shoemaker, 4 Abb. App. Dec. (N. Y.) 149; 2 Keyes (N. Y.), 271. But see Cooper v. Shaver, 41 Barb. (N. Y.) 151.

[91] Cooper v. Shaver, 41 Barb. (N. Y.) 151.

[92] Greeley v. Iowa State Ins. Co., 50 Iowa, 86; Lothrop v. Greenfield etc. Ins. Co., 2 Allen (Mass.), 82; Yoe v. Harvard etc. B. Assn., 63 Md. 86; Weekly v. Northwestern B. & Mut. Aid. Assn., 19 Bradw. (Ill.) 327; Esplein v. Mutual Aid Assn., 28 La. Ann. 938; Union Mut.

assured before forfeiture can be declared, where the by-law provides for forfeiture within a specified time after mailing notice to the member's address,[93] and if it be expressly or impliedly stipulated that notice shall be given by a deposit of the same in the postoffice in a certain city, addressed to the address left in writing at the association's office, it is sufficient notice if such rule is complied with, even though it is never received.[94] And the notice is sufficient if mailed to the assured at his last known address where the contract provides for such mode of transmission. The fact that the party has changed his address does not affect the sufficiency of the notification where such change is unknown to the society.[95] But if the charter requires that members shall be notified of assessments by circular or verbally, and that if they do not pay within a fixed time they will forfeit protection through their policy, such personal liability cannot attach from merely mailing the notice, but it must be actually received.[96] So in Illinois mere proof of the mailing to the member's last address of notice of assessments, without proof that it was or could have been received by him within the specified time before actual payment, is insufficient to sustain a forfeiture.[97] And generally, in the absence of some provision to the contrary, notice when required to be given must be shown to have been actually received.[98] Thus, if the by-laws provide that notice shall be given, notice by mail directed to the insured without proof of the actual receipt of the same is insufficient,[99] and if the articles of association provide for payment within a specified time "after receiving no-

Acc. Assn. v. Miller, 26 Ill. App. 230; Borgraefe v. Supreme Lodge K. & L. of H., 22 Mo. App. 127.

[93] See Survick v. Valley Mut. L. Assn. (Va. 1895), 23 S. E. Rep. 223.

[94] Epstein v. Mutual Aid Assn., 28 La. Ann. 938.

[95] Lothrop v. Greenfield etc. Ins. Co., 2 Allen (Mass.), 82.

[96] Castner v. Farmers' Mut. F. Ins. Co., 50 Mich. 273.

[97] Northwestern Traveling Men's Assn. v. Schauss, 148 Ill. 304; 51 Ill. App. 78; 35 N. E. Rep. 747.

[98] McCorkle v. Texas B. Assn., 71 Tex. 149; 8 S. W. Rep. 516; Protective L. Ins. Co. v. Palmer, 81 Ill. 88; Schmidt v. German Mut. Ins. Co. of Indiana, 4 Ind. App. 340; 30 N. E. Rep. 939; Gunther v. New Orleans Cotton Exch. Mut. Aid Assn., 40 La. Ann. 776; 5 S. Rep. 65.

[99] McCorkle v. Texas B. Assn., 71 Tex. 149; 8 S. W. Rep. 516.

tice," actual notice must be shown to have been received, even though the by-laws provide for notice by publication.[100] If assessments are required to be paid within a specified time from "date" of the notice, this means the date when it is or should be received.[101] Again, if the notice is mailed to an unauthorized address, the company assumes the risk of delivery, even though prior notices sent to the same address had been received.[101] The question whether a notice has been received is for the jury,[103] especially so in case the evidence is uncertain as to how the notice was addressed, and whether it was mailed, and it does not appear that it was delivered or that the member was on the list from which the notices were made out.[104]

§ **1336. Service by Mail.**—Service of notice by mail may be sufficient under the terms of the contract,[105] and the statute may provide for service of notice by registered letter addressed to the assured at his postoffice address named in or on the policy,[106] in which case the service is complete when the letter is mailed;[107] and notice of an assessment may be mailed the day before its date.[108] If notice is sent by mail, it is obligatory upon the sender to comply with all the prerequisites necessary to enable it to reach the other party in due course of mail; that is, it must be properly addressed and mailed, postage prepaid, and the company must show these facts affirma-

[100] Schmidt v. German Mut. Ins. Co. of Indiana, 4 Ind. App. 340; 30 N. E. Rep. 939.

[101] United States Mut. Acc. Assn. v. Mueller, 151 Ill. 254; 37 N. E. Rep. 882.

[102] Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15; 17 N. E. Rep. 396.

[103] McCorkle v. Texas B. Assn., 71 Tex. 149; Jackson v. Northwestern Mut. Relief Assn., 78 Wis. 463; 47 N. W. Rep. 733.

[104] Jackson v. Northwestern Mut. Relief Assn., 78 Wis. 463; 47 N. W. Rep. 733.

[105] Lothrop v. Greenfield Stock Mut. Ins. Co., 2 Allen (Mass.), 82; Epstein v. Mutual Aid Assn., 28 La. Ann. 938; Zeigler v. Mutual Aid & B. L. Ins. Co., 1 McGl. (La.) 284, and cases under last section.

[106] Laws Iowa, 1880, c. 210, sec. 2; McClain's Code, p. 299. See sec. 1324 N. Y. Stats.; and note 35 under sec. 1326, herein.

[107] Ross v. Hawkeye Ins. Co., 83 Iowa, 586; 50 N. W. Rep. 47; McKenna v. State Ins. Co., 73 Iowa, 453; 35 N. W. Rep. 519.

[108] Van Frank v. United States M. B. Assn., 158 Ill. 560; 41 N. E. Rep. 1005.

tively, both in pleading and evidence;[109] for the burden of proving notice of assessments is upon a beneficial association,[110] and upon such showing the presumption attaches that the letter was received in the regular course of mail.[111] A notice is not mailed if it is merely left in a place from which a mail carrier is accustomed to take letters for deposit in the mail.[112] A notice may be addressed to the residence named in the policy until the company is notified of the change.[113] But the fact of finding the notice among the policy holder's effects seventeen days after the premium was due, and forty-seven days after its date, does not of itself, in the absence of other evidence, prove that it was properly addressed and mailed as required by the statute, especially where the address on the notice was not the policy holder's last-known address;[114] and where the mailing was only proved by the general course of business of the company, and three notices for three members of the same family, all of whom were certificate holders in the company, were inclosed in one envelope and received by one of them, it was found that the notice was not mailed, and the court refused to disturb such finding.[115] If there is an indorsement on the policy that the first premium will be payable on a specified date, assured has a right to rely thereon, and will not for-

[109] See Haskins v. Kentucky Grangers' Mut. B. Soc., 7 Ky. L. Rep. 371; Lothrop v. Greenfield Stock Mut. Ins. Co., 2 Allen (Mass.), 82.

[110] Shea v. Massachusetts B. Assn., 160 Mass. 289; 39 Am. St. Rep. 475.

[111] Hastings v. Brooklyn L. Ins. Co., 44 N. Y. St. Rep. 37; 17 N. Y. Supp. 333; 63 Hun (N. Y.), 624; Benedict v. Grand Lodge A. O. U. W., 48 Minn. 471; 51 N. W. Rep. 371; 21 Ins. L. J. 438.

[112] So held in Molloy v. Supreme Coun. Cath. B. Assn. (Iowa, 1895) 61 N. W. Rep. 928.

[113] Lothrop v. Greenfield Stock Mut. Ins. Co., 2 Allen (Mass.), 82. Statutory notice sent to joint address: If a policy is issued to husband and wife on their lives, and the statutory notice is sent addressed to them jointly, he cannot avail himself of his neglect to deliver the notice to his wife, and so claim a nonforfeiture for the nonpayment of the premium due: Mullen v. Mutual L. Ins. Co. (Tex. Civ. App. 1895), 32 S. W. Rep. 911.

[114] Phelan v. Northwestern Mut. L. Ins. Co., 113 N. Y. 147; 20 N. E. Rep. 827.

[115] Garretson v. Equitable Mut. L. etc. Assn., 74 Iowa, 419; 38 N. W. Rep. 127.

feit his rights under the policy for nonpayment of an assessment mailed to him before such specified time, even though it is stipulated in the policy that mailing notice of an assessment, postage prepaid, will be sufficient notice, and that payment must be made within one calendar month thereafter.[116]

§ **1337. Notice Wrongly Addressed.**—If the notice of assessment is wrongly addressed, owing to the collector's mistake, to a place where the member never resided, and it is never received by him, the nonpayment of such assessment when due does not operate as a forfeiture where the by-laws require notice to be mailed or left at the member's last-known postoffice address or residence.[117] If notice of an assessment is required by the constitution to be mailed to the "last address as shown" by certain books, there is no forfeiture for nonpayment of assessments where the notice is mailed to another address.[118]

§ **1338. Notice by Publication.**—If notice by publication is required, or if public notice by advertisement is provided for, such notice must be given in the mode and for the time prescribed, in order to establish a forfeiture or suspension or to maintain a suit against a member where such action may be had,[119] and if public notice by advertisement is specified, proof of personal notice is insufficient.[120] So in case the statute provides that the directors may publish notice of assessments in such manner as they shall see fit, or as the by-laws shall have prescribed, they must comply with the mode prescribed in the by-laws for publication of notices, but in the absence of by-laws on the subject they may exercise their discretion, and defects in the notice arising from noncompliance with the by-

[116] Ball v. Northwestern Mut. Acc. Assn., 56 Minn. 414; 57 N. W. Rep. 1063.

[117] Waterworth v. American O. of D., 164 Mass. 574; 42 N. E. Rep. 106.

[118] Molloy v. Supreme Coun. Cath. B. Assn. (Iowa, 1895), 61 N. W. Rep. 928.

[119] Northampton etc. Livestock Ins. Co. v. Stewart, 39 N. J. L. 486; Pennsylvania Training School v. Independent Ins. Co., 127 Pa. St. 559; Fitzpatrick v. Mutual B. L. Ins. Assn., 25 La. Ann. 413.

[120] Northampton etc. Livestock Ins. Co. v. Stewart, 39 N. J. L. 486.

laws will not be aided by a personal demand.[121] A requirement in the charter that public notice be given when advertising an assessment made, means notice by advertisement in a newspaper.[122] And if the by-laws provide that payment must be made in a specified number of days after publication, they must be so made.[123] So where the charter provides for notice of death by posting notice thereof in the exchange, and for payment within a specified time thereafter, a member who fails to pay an assessment of which notice was so posted forfeits his certificate.[124] If the notice is required to be published five days, payment of an assessment to be called for within thirty days thereafter, and the time of publication is extended by notice to eight days, payment to be made at the office of the company within thirty days thereafter, the notice must be published the full eight days, and no forfeiture can be declared for nonpayment prior to the expiration of the thirty days thereafter;[125] and if the by-laws provide for publication of notices of assessments on premium notes in three newspapers in the county where the company is organized and transacting business, compliance with such by-laws must be proven to warrant a recovery of an assessment, or it must be shown that it was not possible to comply therewith because there were not the specified number of newspapers in the county. A proof of publication in two newspapers without such other proof is insufficient, nor is there any obligation on the part of the member to show that there were three newspapers.[126] But the fact that the by-laws provide for notice by publication in one or more newspapers does not preclude the necessity for actual notice when the articles of association provide for the latter.[127]

[121] Sands v. Sanders, 26 N. Y. 239

[122] Pennsylvania Training School v. Independent Mut. F. Ins. Co., 127 Pa. St. 559; 25 Week. Not. Cas. 53; 18 Atl. Rep. 392.

[123] Madeira v. Merchants' etc. B. Soc., 16 Fed. Rep. 749.

[124] Maginnis' Estate v. New Orleans Cotton Exch. and Mut. Aid Assn., 43 La. Ann. 1136; 10 S. Rep. 180; 21 Ins. L. J. 171.

[125] Fitzpatrick v. Mutual B. L. Ins. Assn., 25 La. Ann. 443.

[126] Sands v. Graves, 58 N. Y. 94.

[127] Schmidt v. German Mut. Ins. Co. of Indiana, 4 Ind. App. 340; 30 N. E. Rep. 939.

§ **1339. Computation of Time.**[128]—In computing the time within which the days allowed for payment of an assessment begin to run, regard must be had to the requirements or agreement concerning notice.[129] Thus, if the statute provides that notice may be transmitted by registered letter, the time limited for payment begins to run from the day the letter is properly and duly mailed.[130] In the computation of time under the New York statute as to notice of maturity of premiums, the day of mailing is to be excluded, and a notice mailed November 2d, stating that the premium will be due December 2d, does not cover the thirty days required.[131] If the by-laws provide for forfeiture in case of nonpayment within thirty days from the date of the assessment, the "date" means the time when it was made out by the secretary and mailed to the assured, and it is no excuse that the notice never reached the assured where it is properly mailed and addressed. This case distinguishes those cases wherein time is to be computed from the "date of notice."[132] Again, it is held that sending notice when required under the by-laws is an essential part of the notice or assessment, and it must, therefore, be sent within a reasonable time after its date, and otherwise the time allowed for payment should not be computed from such date.[133] On a line with this case are two other cases, one in Kentucky and one in Minnesota, where the constitution of the society provided that the assessment should be paid by the member not later than the twenty-eighth day of the month, and that notices of assessments should be sent not later than the eighth day of the month on which the assessment was issued. Although this provision of the constitution was construed as allowing twenty days for payment before forfeiture could be declared, it was held in the first-named state that it was sufficient if a reasonable time was

[128] See sec. 170, herein.

[129] Weakly v. Northwestern B. etc. Soc., 19 Bradw. (Ill.) 327.

[130] Ross v. Hawkeye Ins. Co., 83 Iowa, 586; 50 N. W. Rep. 47; 21 Ins. L. J. 121.

[131] Hicks v. National L. Ins. Co. (U. S. C. C. A. 1894), 60 Fed. Rep. 690; Laws N. Y. 1877, c. 321.

[132] Weakly v. Northwestern B. etc. Soc., 19 Bradw. (Ill.) 327.

[133] Stanley v. Northwestern L. Assn., 36 Fed. Rep. 75.

given from the sending of the notice, even though the full time of payment was not allowed, and in the latter case a suspension of the member by the society on the twenty-ninth day of the month was sustained, and this although the notice in the first case was not sent until the ninth or tenth of the month, and in the latter case not until about the twelfth of the month.[134] While it might be urged that there is a distinction between an agreement to pay on a specified day, where a reasonable time is given to meet the obligation, and an agreement that a specified number of days from the date of notice shall be given for payment, nevertheless these decisions are subject to criticism in this, that if the constitution be construed to allow the full twenty days for payment of an assessment, it is doubtful if rulings which, contrary to contract stipulations, tend to shorten such specified time, will be favorably considered, especially where the forfeiture of contract rights follows such construction. And the main objection to these decisions must be based on the point that the constitution was construed to allow twenty days for payment. There is another class of cases which are similar, in that the notice frequently provides for payment within a certain number of days from date, but in addition specifies in the notice the date on which the time for payment will expire, and in so far as such specification of a certain day as the time limit conforms to the charter or constitution and by-laws, or, in brief, with the contract, it would seem to exclude the question of computation of time; but this ought certainly to be based only on the assumption that the notice must be sent in due and reasonable time after date, but even in such case if the contract allows a certain number of days after notice for payment, it is doubtful if the company may, by designating a certain day, impose an obligation on the insured not contained in the contract. Thus, it is the general rule in cases where the assessment is to be paid within a specified number of days after date or after service of notice, or after notice is sent to the assured, or in cases of like character

[134] Ancient Order United Workmen v. Moore (Ky.), 1 Ky. L. Rep. 93; Benedict v. Grand Lodge A. O. U. W., 48 Minn. 471; 51 N. W. Rep. 371; 21 Ins. L. J. 438.

where the policy holder or assured is entitled to actual receipt of notice, that the day when the notice is actually received should be excluded in the computation of time.[135] And if the notice is agreed to be sent by mail, the computation of time must be from the day when a properly addressed and mailed letter would reach the party in regular course of mail; that is, such day must be excluded,[136] even though notice is not actually received.[137] Where the requirement is for notice by publication for a stated time and payment within a certain number of days after notice, or after date of the death of a member and notice thereof by publication, the time should be computed from and after the expiration of the last day of publication.[138] In computing the time from which dues commence to be in arrears, as in case of dues in arrears for six months, the time commences to run from and after the last day of the period at the termination of which they are due and payable.[139]

[135] Protection L. etc. Co. v. Palmer, 81 Ill. 88 (after "date of notice"); American Mut. Aid Soc. v. Quire (Ky.), 8 Ky. L. Rep. 101 (the charter provided for payment within a specified time after notice "served on" or "sent to" the assured; the date of receiving notice is the date from which time is computed); Great Western Mut. Aid Assn. v. Colman (Colo. App. 1895), 43 Pac. Rep. 159.

[136] Lothrop v. Greenfield Mut. etc. Soc., 2 Allen (Mass.), 82; National Mut. B. Assn. v. Miller, 85 Ky. 88; 2 S. W. Rep. 900.

[137] Lothrop v. Greenfield Mut. etc. Soc., 2 Allen (Mass.), 82.

[138] Wetmore v. Mutual Aid & B. Assn., 23 La. Ann. 770.

[139] Bukofzer v. United States Grand Lodge etc. (N. Y. S. C. 1891), 40 N. Y. St. Rep. 653; 15 N. Y. Supp. 922; 61 Hun (N. Y.), 625; Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.

CHAPTER XXXIV.

PREMIUMS, ETC.—EXCUSES, WAIVER AND ESTOPPEL.

§ 1345. Whether war excuses nonpayment premium.
§ 1346. What excuses nonpayment premiums and assessments—Generally.
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§ 1380. Waiver by giving credit for the premium.
§ 1381. Defense that waiver induced by false representations.
§ 1382. Waiver by agents: Subordinate lodges.
§ 1383. Waiver by assured of exemption from assessment.
§ 1384. Waiver by assured of defective notice and service of same.

§ 1345. Whether War Excuses Nonpayment of Premium.—We have already considered somewhat at length the effect of war upon the contract of insurance, and we refer to the authorities there noted for the determination of this question.[1]

§ 1346. What Excuses Nonpayment of Premiums and Assessments—Generally.—If the company refuses to perform its contract, nonpayment of the premium at the stipulated day excuses the assured.[2] But the company must be in fault, and there must be a readiness and willingness to perform to excuse a failure to pay a premium as agreed.[3] That an assessment is invalid, or that a required notice of payment of premiums or assessments is invalid, constitutes a sufficient excuse for nonpayment of the premium or assessment.[4] And if the assured has been fraudulently induced to surrender his policy,

[1] See c. xi, herein.

[2] Shaw v. Republic L. Ins. Co., 69 N. Y. 286.

[3] Attorney General v. Continental L. Ins. Co., 64 How. Pr. (N. Y.) 519; People v. Globe Mut. L. Ins. Co., 32 Hun (N. Y.), 147.

[4] Cooper v. Shaver, 41 Barb. (N. Y.) 151; Rosenberger v. Washington F. Ins. Co., 87 Pa. St. 208. See secs. 1290-1311, and c. xxxi, herein.

this affords a sufficient excuse as to the beneficiary for the nonpayment of premiums.[5] The question as to what excuses nonpayment of premiums, assessments, or dues is also involved in numerous cases relating to the payment of premiums, assessments, and dues generally already considered, and also in many decisions concerning waiver and estoppel noted under this chapter.

§ **1347. Excuses—Omitting Customary Statement—Amount Unknown.**—Where the premium is paid partly in cash and partly in interest-bearing premium notes, and the company has been accustomed for years from the time of issuing the policy to make out and deliver to the assured a statement showing the amount due, it cannot withdraw its agent and discontinue such practice without notice, and thereupon, without having sent the regular statement, declare the policy forfeited for nonpayment of the premium when due, and cancel the contract.[6] So if a knowledge of the amount due is known only to the company, which keeps silent as to the same when asked, and the amount is unknown at the time when payable, there is a sufficient excuse for a default.[7] And if the assured has neither knowledge as to the time when premiums will become due nor possession of the policy, and the company, upon request made at its office, promises to send the necessary information, but does not, it cannot take advantage of its own fault and base a defense thereon to an action for recovery on the policy.[8]

§ **1348. Excuses—Change of Agency Without Notice.** Nonpayment on the day is excused where the company neglects to inform the assured of a change of the agent authorized to receive payments, after it has adopted a rule to give notice

[5] Whitehead v. New York L. Ins. Co., 102 N. Y. 143.

[6] Meyer v. Knickerbocker L. Ins. Co., 51 How. Pr. (N. Y.) 263.

[7] Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; Dean v. Ætna L. Ins. Co., 2 Hun (N. Y.), 358; 4 N. Y. S. C. 497.

[8] Leslie v. Knickerbocker L. Ins. Co., 63 N. Y. 27; 2 Hun (N. Y.), 616; 5 N. Y. S. C. 193. See, also, chapter preceding on notice.

in all such cases, and the premium is tendered when due to the agent accustomed to receive payments, and there has been a reasonable endeavor by the assured to find the new agent. And the circumstances may entitle the assured to a reasonable time within which to make payment after the premium became due, especially when punctual payment had been waived the previous year and sixty days is held to be a reasonable time.[9]

§ **1349. Excuses—Insolvency—Company Ceasing to do Business.**—In the matter of premiums, the insolvency of the company so far determines the contract as to the insured that no obligation rests upon him to pay premiums thereafter falling due.[10] But in the matter of assessments and dues in mutual companies, the contract must govern; thus, in the case of security or premium notes the maker may be liable thereon, notwithstanding the company's insolvency, for insolvency is not such a failure of consideration as to release the maker,[11] although the contract may be such that after insolvency the company cannot insist upon forfeiture of the policy for a refusal to renew the same or to pay assessments levied thereon.[12] If the insured would avail himself of the excuse of insolvency, he must show his readiness and willingness to pay had the company been solvent.[13] If the company has become insolvent, transferred its assets, and stopped business, it cannot claim a

[9] Seamans v. Northwestern Mut. L. Ins. Co., 3 Fed. Rep. 325, and see cases cited in this case as to reluctance of courts to enforce forfeitures in this class of cases; Briggs v. National L. Ins. Co., 11 Fed. Rep. 458. See Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; 51 How. Pr. (N. Y.) 263, noted under preceding section, where agent was withdrawn.

[10] In re Albert Ins. Co., L. R. 9 Eq. 703; Attorney General v. Guardian Mut. L. Ins. Co., 82 N. Y. 336; People v. Globe Mut. L. Ins. Co., 32 Hun (N. Y.), 147; People v. Empire Mut. L. Ins. Co., 92 N. Y. 105; 28 Hun (N. Y.), 358; Jones v. Life Assur. Co., 83 Ky. 75.

[11] Sterling v. Mercantile M. Ins. Co., 32 Pa. St. 75; 72 Am. Dec. 773.

[12] Conigland v. North Carolina M. Ins. Co., 1 Phil. Eq. (N. C.) 341; 98 Am. Dec. 89. See secs. 1231, 1232, 1272, 1273, herein, where this question is considered.

[13] People v. Globe Mut. L. Ins. Co., 32 Hun (N. Y.), 147.

forfeiture for nonpayment of premiums, although it is authorized by statute to discontinue and to reinsure its risks;[14] and no payment need be made if an inquiry is pending as to the company's solvency, it being meanwhile restrained by an injunction from transacting business.[15] So nonpayment of dues in a safety fund association after it stops business, and pending the dissolution, does not forfeit the certificate,[16] and it is held that if a foreign company ceases to do business at the place where the premium is stipulated to be paid, and maintains no known agency there, nonpayment is excused.[17] So where the company becomes insolvent and a receiver is appointed, who gives notice that he will receive no more premiums, the insured is excused.[18] But it is not a sufficient excuse for a refusal to pay premiums, that, owing to wrongful acts of the company's officers, it had become insolvent, and therefore it was unsafe to pay, if the company still continues to do its ordinary business in the ordinary way, and is ready to receive premiums,[19] nor is the insured excused from payment of a premium which falls due several months before the insolvency.[20] Although the insolvency of the company terminates the obligation to pay subsequently accruing premiums, it does not prevent the enforcement of a claim for damages from the day of the order in insolvency.[21] And where premiums have been paid for some time subsequent to the date of the appointment of a receiver, the referee may allow the claims of those dying after the times at which premiums have been paid, and the claimants are each

[14] People v. Empire Mut. L. Ins. Co., 92 N. Y. 105; 28 Hun (N. Y.), 358.

[15] Coffee v. Universal L. Ins. Co., 10 Biss. (C. C.) 354; 7 Fed. Rep. 301. Contra, Universal L. Ins. Co. v. Whitehead, 58 Miss. 226; 10 Ins. L. J. 337.

[16] Burdon v. Safety Fund Assn., 147 Mass. 360; 6 New Eng. Rep. 840; 17 N. E. Rep. 874.

[17] Dorion v. Positive G. etc. Co., 23 Low. Can. Jur. 261. But see sec. 1168, herein.

[18] Attorney General v. Guardian Mut. L. Ins. Co., 82 N. Y. 336.

[19] Taylor v. Charter Oak L. Ins. Co., 9 Daly (N. Y.), 489.

[20] Attorney General v. Continental L. Ins. Co., 64 How. Pr. (N. Y.) 519.

[21] In re Albert L. Ins. Co., L. R. 9 Eq. 703; Attorney General v. Guardian Mut. L. Ins. Co., 82 N. Y. 336.

entitled to be allowed the present value of the policy at the time of the dissolution of the company and the appointment of the receiver, deducting the amount of premiums unpaid at the time of death;[22] and where proceedings are instituted in insolvency against the company, and it admits the fact, and is so adjudged, a receiver appointed, and the outstanding policies canceled, the contract is so far terminated as to preclude the right to recover for losses subsequently accruing, and this is so notwithstanding the policy stipulates for a notice of a contemplated cancellation.[23]

§ 1350. Act of God—Sickness—Death—Accident—Insanity—No Excuse—Exceptions.—Although it is held that a stipulation for forfeiture for nonpayment of annual premiums does not apply to a contingency occasioned by the act of God, or of the law rendering such payment impossible,[24] nevertheless the general rule is, that no mere accident or act of God, however controlling, can keep the policy in force after the day without payment.[25] The fact that one is so sick and delirious until he dies that he can do nothing about paying the premium, does not present a case of impossibility caused by the act of God such as to prevent a forfeiture,[26] nor does sudden sickness, nor mental or physical incapacity, nor paralysis, nor inability to attend to business afford an excuse for nonpayment of premiums or assessments as stipulated.[27] But this rule does

[22] Attorney General v. Guardian Mut. L. Ins. Co., 82 N. Y. 336.

[23] Reliance Lumber Co. v. Brown (Ind. 1892), 30 N. E. Rep. 625.

[24] Hillyard v. Mutual etc. Ins. Co., 35 N. J. L. 415.

[25] Howell v. Knickerbocker Ins. Co., 44 N. Y. 276; 4 Am. Rep. 675.

[26] Carpenter v. Centennial Mut. L. Assn., 68 Iowa, 453.

[27] Thompson v. Knickerbocker L. Ins. Co., 104 U. S. 252; Scully v. Kirkpatrick, 79 Pa. St. 324; Ingram v. Supreme Council etc., 14 N. Y. St. Rep. 600; Howell v. Knickerbocker L. Ins. Co., 44 N. Y. (5 Hand.) 277; 3 Rob. (N. Y.) 232; 4 Am. Rep. 675; Hawkshaw v. Supreme Lodge, 29 Fed. Rep. 77; Smith v. Pennsylvania Mut. L. Ins. Co., 11 Week. Not. Cas. (Pa.) 295; School District v. Dauchy, 25 Conn. 530; Carpenter v. Centennial Mut. L. Assn., 68 Iowa, 453; 27 N. W. Rep. 45; Klein v. Insurance Co., 104 U. S. 88; Donald v. Piedmont etc. L. Ins. Co., 4 S. C. 321; Voe v. Benjamin C. Howard Mut. B. Assn., 63 Md. 86; Carpenter v. Centennial Mut. L. Assn., 68 Iowa, 453; 27 N. W. Rep. 45.

not exclude any agreement to the contrary which the parties may lawfully make, and it is held in Nebraska that a default in making payments during illness will not work a forfeiture of a certificate in the Ancient Order of United Workmen.[28] And the charter, constitution, or articles of association may expressly or impliedly provide to the contrary, as in case where sudden sickness may constitute a "valid reason" for default.[29] So it may be stipulated that the party shall have a right to make payment within a reasonable time after it is due, and where in such case the assured left his house in apparent good health for his place of business, intending then to pay, but was stricken with paralysis and remained unconscious until his death the next day, it was held that payment was excused.[30] So the insanity of the insured is not an excuse for his failure to pay premiums,[31] and this last rule applies to the payment of assessments in benevolent societies.[32]

§ 1351. Death of Agent—Failure to Find Agent—Agent's Neglect or Misrepresentations no Excuse.—The death of the local agent is no excuse for nonpayment of premium, so as to prevent forfeiture, where the premiums are agreed to be paid at the home office,[33] and the insured must use reasonable and sufficient diligence in making payment to avoid a forfeiture; such diligence is not exercised where the insured goes with the soliciting agent to the general agent's office to make payment, and, being informed that the general agent through whom the policy had been issued was succeeded by another, who was out at the time, went away in company with the soliciting agent, but left it to the latter to pay the premium, he having promised to do so out of his own pocket, and this even though the latter did call again two or three times during the day.[34]

[28] Grand Lodge A. O. U. W. v. Brand, 29 Neb. 644; 46 N. W. Rep. 95.

[29] See sec. 1276, herein.

[30] Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276; 3 Rob. (N. Y.) 232; 4 Am. Rep. 675 (two judges dissenting).

[31] Wheeler v. Connecticut Mut. L. Ins. Co., 82 N. Y. 543; 37 Am. Rep. 594.

[32] Hawkshaw v. Supreme Lodge of Knights of Honor, 29 Fed. Rep. 770.

[33] Bulger v. Washington L. Ins. Co., 63 Ga. 328.

[34] Cronkhite v. Accident Ins. Co., 35 Fed. Rep. 26.

So it is held in Louisiana that there is no law of that state which requires foreign companies making insurance contracts there to keep resident agents there to receive premiums.[35] But it is held that where no place of payment of a note given for the premium is specified, and no place of payment of the premium itself is fixed either in the policy or application, that no place of payment being found in the state where the insured resides constitutes a reasonable excuse for its nonpayment at maturity, even though the policy provides for forfeiture in case of nonpayment of such note when due, and that the maker is not obligated to pay the same at the home office.[36] But where the agent of the insured, who was his book-keeper, was intrusted to pay assessments, but absconded, having embezzled a large sum of money, it was held that this constituted no sufficient excuse, as the agent's fault was that of the principal,[37] and it is no excuse that the assured relied upon the statements of the agent of the company that the dividends would pay the premium.[38] And a breach of representations made during negotiations, and not embodied in the completed contract, afford no excuse for nonpayment.[39]

§ 1352. What is not an Excuse—Absence of Assured—Lapse of Policy by Accident—Other Instances.—If the contract provides for notice of an assessment by mail, and also for forfeiture in case of neglect for thirty days to pay the same, and such notice is properly mailed to the insured at his last known address, but by mistake of the postmaster is forwarded to the insured, who was then in Europe, and in consequence the assessment is not paid in time, it is held that the insured cannot recover for a loss of the property by fire, even

[35] Quinn v. Manhattan L. Ins. Co., 28 La. Ann. 135. See sec. 1168, herein.

[36] Blackerby v. Continental Ins. Co. (Ky.), 15 Ins. L. J. 756.

[37] Graveson v. Cincinnati L. Assn. (Ohio C. P. C. 1891), 26 Week. L. Bull. 183.

[38] Hale v. Continental L. Ins. Co., 20 Blatchf. (C. C.) 515; 12 Fed. Rep. 359.

[39] Bogardus v. New York L. Ins. Co., 101 N. Y. 328. But see sec. 1235, herein, as to payment by application of dividends.

though he had an agent in charge to whom the notice might have been given by the postmaster,[40] and that the company has the policy is held no excuse.[41] So a lapse of policy by accident is no excuse,[42] and where a by-law of the company provides for suspension of the risk unless an assessment is paid within a certain time, neglect to pay the same is not excused by the fact that the company owes the member from whom the payment is due a less sum, if he does not offer to pay the balance,[43] nor can it avail the member that a sum was due from the lodge sufficient to pay the assessment where it was due from another and distinct fund.[44] And it is no excuse for a default in payment of premiums that the company neglected to keep separate all the premiums paid on policies of the same class to which the policy issued belonged, it being issued on the tontine or ten-year dividend system,[45] nor is it any excuse that the company has not given the local agent a receipt for the premium.[46]

§ 1353. **Waiver of Punctual Payment of Premiums, Assessments, and Dues—Estoppel—Generally.**—A provision for forfeiture for nonpayment of premiums when due is for the benefit of the insurer, and may be waived by it.[47] It is necessary, to support a claim of waiver, that there be an actual knowledge of the material facts by the party against whom the waiver is claimed,[48] or a waiver, to be operative, must be supported by an agreement founded on a valuable consideration,[49]

[40] Greeley v. Iowa State Ins. Co., 50 Iowa, 86.

[41] Howard v. Mutual B. L. Ins. Co., 6 Mo. App. 577.

[42] Windus v. Tredegar, 15 L. T., N. S., 108.

[43] Hollister v. Quincy Mut. F. Ins. Co., 118 Mass. 478.

[44] Ancient O. U. W. v. Moore (Ky.), 1 Ky. L. Rep. 93.

[45] Bogardus v. New York L. Ins. Co., 101 N. Y. 328.

[46] Morey v. New York L. Ins. Co., 2 Wood (C. C.) 664.

[47] Michigan Mut. L. Ins. Co. v. Custer, 128 Ind. 125; 27 N. E. Rep. 124; Nebraska & Iowa Ins. Co. v. Christiensen, 29 Neb. 572; 26 Am. St. Rep. 407.

[48] Robertson v. Metropolitan L. Ins. Co., 88 N. Y. 541; Reynold v. Mutual etc. Ins. Co., 34 Md. 280.

[49] Underwood v. Farmers' etc. Ins. Co., 57 N. Y. 500; Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362; Marvin v. Universal L. etc. Co., 35 N. Y. 278; 16 Hun (N. Y.), 494; Farmers' & M. F. Ins. Co.

and it must have been intended,[50] or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.[51] But it is held that a waiver will be inferred from slight evidence, and the company, if it intends to insist upon a forfeiture for nonpayment of premiums, must strictly conform to the stipulations of the contract, and not attempt to secure profits which a departure therefrom would give it.[52] If the failure of the company to send a notice of an assessment waives a forfeiture, its employee's mistake in the matter is immaterial.[53] The general doctrine of waiver applicable to other insurance companies is equally applicable to mutual benefit societies.[54] Although the insured may insist upon the waiver, he is not obligated to accept the same, and may insist upon the forfeiture, and interpose, on account thereof, whatever defense he may have against the assessment, provided he would otherwise be obligated to pay it.[55] The time of payment of premiums may be extended by the company or its agent empowered so to do,[56] and the company is not obligated to insist upon the forfeiture when incurred, but it may, at its option, accept payments thereafter made,[57] and such act does not operate as a waiver of

v. Chestnut, 50 Ill. 111; Evans v. United States L. Ins. Co., 3 Hun (N. Y.). 587.

[50] Diehl v. Adams Co. M. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302.

[51] Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362; Diehl v. Adams Co. M. Ins., Co., 58 Pa. St. 443; 98 Am. Dec. 302; Marvin v. Universal L. Ins. Co., 16 Hun (N. Y.), 494; 35 N. Y. 278.

[52] Johnson v. Southern Mut. L. Ins. Co., 79 Ky. 403.

[53] Mills v. Home B. L. Ins. Assn., 105 Cal. 232; 38 Pac. Rep. 723.

[54] Millard v. Supreme Coun. American Legion of Honor, 81 Cal. 340; 22 Pac. Rep. 864. Contra, Mitchell v. Mutual L. Ins. Co. of New York, not reported, but cited in Bliss on Insurance, ed. 1872, sec. 472, p. 739. Examine Jennings v.Metropol. L. Ins. Co., 148 Mass. 61; Pittney v. Glen's Falls Ins. Co., 65 N. Y. 21; Mulvey v. Shawmut Mut. F. Ins. Co., 4 Allen (Mass.), 116; 81 Am. Dec. 689. See secs. 34, 35, 393, 397, 398, herein.

[55] Tuckerman v. Bigler, 46 Barb. (N. Y.) 375.

[56] McCraw v. Old North State Ins. Co., 78 N. C. 149; Palmer v. Phœnix Mut. L. Ins. Co., 84 N. Y. 63.

[57] McGeachie v. North American L. Assur. Co. (Ont. H. C. of J. Q. B. Div. 1892), 12 Can. L. J. 220; Tripp v. Vermont L. Ins. Co., 55 Vt. 100; Morrow v. Des Moines Ins. Co. (Iowa, 1892), 51 N. W. Rep. 3, Smith v. St. Paul F. etc. Ins. Co., 3 Dak. 80.

its right to insist that prompt payment shall be thereafter made.[58] And there is no doubt but that the company may, by a due and reasonable notice, terminate a course of business as to receiving overdue premiums relied on to establish a waiver by the assured and insist that the contract stipulations as to payment be thereafter strictly complied with.[59] If a certificate is issued after a default in paying an assessment, it operates as a waiver of forfeiture.[60] So if the company continues by unequivocal acts to recognize the policy as valid after a default, there is a waiver,[61] and although a notice of forfeiture is given by the company, yet there may be a waiver by the failure of the company to comply with the terms of the contract and return the premium note, which is unpaid.[62] So a return of the policy to the assured who has surrendered it for breach of condition or to use will not waive a condition that the company is not liable for any loss occurring while any part of the premium remains unpaid.[63] If the assured is not alive at the time of the acts relied upon as a waiver, there is no waiver of forfeiture for nonpayment of premium.[64] The waiver by an insurance company of its right to declare a policy void because the note given for the cash premium is not paid at maturity, does not preclude the company from insisting upon a condition in the policy declaring the same void, in case of loss or damage, if the premium note is unpaid and past due at the time of such loss.[65]

§ 1354. Waiver and Estoppel—Prior Parol Agreements as to Payment of Premiums, etc.—The insured will not be permitted to show, in order to establish a waiver of punctual payment of premiums, assessments, or dues, or to avoid a

[58] Morrow v. Des Moines Ins. Co., 84 Iowa, 256; 51 N. W. Rep. 3.
[59] See Insurance Co. v. Hinsley, 75 Ind. 1, per the court.
[60] Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.
[61] Olmstead v. Farmers' M. F. Ins. Co., 50 Mich. 200.
[62] Johnson v. Southern Mut. L. Ins. Co., 79 Ky. 403.
[63] Nedrow v. Farmers' Ins. Co., 43 Iowa, 24.
[64] Simpson v. Accidental Death Ins. Co., 2 Com. B., N. S., 257.
[65] Ferebee v. North Carolina etc. Ins. Co., 68 N. C. 11.

forfeiture for default in payment, the acts or declarations of the company or its agents made at or prior to the time the contract was completed, or to show an oral agreement with the company or its agents, where such agreement, acts, or declarations are contrary to the stipulations of the policy, and are not incorporated therein or made part thereof, by reference or otherwise, and the same rule applies to parol evidence of the same character to prove an estoppel.[66] Thus, parol evidence is inadmissible of the representations of the agent, made prior to issuing the policy, that notice of the times of payments of the premiums should be given the insured in season to pay them, and that he need give himself no uneasiness on that subject; such a representation can create no estoppel, for all previous verbal arrangements are merged in the written contract. The doctrine of estoppel does not apply when the statements or acts relate to rights dependent upon written contracts in futuro, and in which when making the same the parties may stipulate as they wish, and may include such matters and conditions as they intend to rely upon.[67] So representations made by the company's agent as to when assessments will be made cannot be introduced in evidence in defense of an action on a premium note.[68] But a parol agreement as to the time of payment of the premium may be shown where it does not conflict with the written contract, although the law, in the absence of such an agreement, would fix an earlier date.[69] But if an agent, by authority of the directors, by false

[66] Howell v. Knickerbocker Ins. Co., 44 N. Y. (5 Hand.) 276; 4 Am. Rep. 675; Lewis v. Phœnix etc. Ins. Co., 44 Conn. 72; Susquehanna Mut. F. Ins. Co. v. Swank, 102 Pa. St. 17; Walton v. Agricultural Ins. Co., 116 N. Y. 317; Coombs v. Charter Oak Ins. Co., 65 Me. 382; Insurance Co. v. Leyman, 15 Wall. (U. S.) 664; Illinois Mut. F. Ins. Co. v. O'Neil, 13 Ill. 89; Franklin L. Ins. Co. v. Sefton, 53 Ind. 380; Ætna Ins. Co. v. Olmstead, 21 Mich. 246, per Cooley, J. See sec. 40, herein.

[67] Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544.

[68] Boland v. Whitman, 33 Ind. 64.

[69] Kentucky Grangers' Mut. B. Soc. v. Adams (Ky. Super. Ct. 1892), 13 Ky. L. Rep. 589. In this case, however, in so far as the rule of law stated by the decision is incurred, there is no objection thereto, but the case is subject to criticism upon the facts as reported, for the policy was issued on the tenth of the month, and the premiums were payable quarter annually, and it was held that an agreement

representations of the company's solvency, induces the assured to execute a premium note, such statements constitute a defense to an action on said note.[70]

§ 1355. Waiver and Estoppel—Subsequent Parol Agreements as to Payments and Premiums, etc.—There is no doubt but that it is competent for the parties to alter or modify the terms of the contract by a parol agreement entered into subsequently to the execution and completion of the contract,[71] and, therefore, evidence is admissible of an agreement by parol to waive the conditions as to payment of the premiums or one as to notice; and acts and declarations of the company and its authorized agent, done and made subsequently to the consummation of the contract, are admissible to establish a waiver of such conditions or to raise an estoppel.[72] Thus, parol evidence is admissible to show that the company agreed with the insured to receive quarterly payments after they became due, if paid within a reasonable time thereafter, and such fact will estop the company to insist upon a technical forfeiture.[73] And evidence is competent and relevant to show that the company has authorized its agent to grant indulgence as to the time of paying the premium notes, or to prove that a valid extension has been granted, or that the forfeiture has been waived, even

could be proven that the payments could be made any time between the tenth and twenty-fifth of the month on which they respectively fell due. If, however, the agreement had been made subsequently to the completion of the contract, the case would be rightly decided.

[70] Whitman v. Missouri, 34 Ind. 487. See, also, sec. 514, herein. For exceptions to the general rule, see Browne on Parol Evidence, ed. 1893, pp. 9, 10, 66-98, etc.; Pindar v. Resolute Ins. Co., 47 N. Y. 114; Planters' Mut. Ins. Co. v. Deford, 38 Md. 382; Van Schoick v. Niagara F. Ins. Co., 68 N. Y. 434. See, also, chapter xix, herein.

[71] Chapter x, herein.

[72] Dilleber v. Knickerbocker L. Ins. Co., 76 N. Y. 567; 7 Daly (N. Y.), 540; Baptist Church v. Brooklyn Ins. Co., 19 N. Y. (5 Smith) 305; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234; Phœnix Mut. L. Ins. Co. v. Hinesly, 75 Ind. 1; Bodine v. Exchange F. Ins. Co., 51 N. Y. 117. See, also, cases cited under following sections.

[73] De Frece v. National L. Ins. Co., 136 N. Y. 144; 32 N. E. Rep. 557; Howell v. Knickerbocker Ins. Co., 44 N. Y. 276; 3 Rob. (N. Y.) 232.

though the policy expressly provides that the company has no power to alter or abrogate contracts or waive forfeitures.[74]

§ **1356. Payment of Premiums—Waiver and Estoppel, Custom, Acts, etc.**—The doctrine of estoppel is applied to some act, declaration, or omission of a party to prevent the same from operating as a fraud upon one who has been induced to act in reliance thereon; as where one has thereby induced another to change his conduct or alter his condition. The party seeking to avail himself of an estoppel must have been misled, to his injury or prejudice, by the words, conduct, or omissions of the other party. If he does not alter his condition, or if both parties are equally cognizant of the existing facts, so that he is not prejudiced by conforming to the course of action on which the claim to an estoppel is based, there is no estoppel. If an insurance company or its authorized agent, by its habits of business, or by its acts or declarations, or by a custom to receive overdue premiums without objection, or by a custom not to exact prompt payment of the same, or, in brief, by any course of conduct, has induced an honest belief in the mind of the policy holder, which is reasonably founded, that strict compliance with a stipulation for punctual payment of premiums will not be insisted upon, but that the payment may be delayed without a forfeiture resulting therefrom, it will be deemed to have waived the right to claim the forfeiture, or it will be estopped from enforcing the same, although the policy expressly provides for forfeiture for nonpayment of premiums as stipulated, and even though it is also conditioned that agents cannot waive forfeitures,[75] and even though the policy provides

[74] Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234.

[75] Home Protection Ins. Co. v.Avery, 85 Ala. 48; 5 S. Rep. 143; Brooklyn L. Ins. Co. v. Bledstone, 25 Ala. 538; Mound City Ins. Co. v. Huth, 49 Ala. 529; Mobile L. Ins. Co. v. Pruett, 74 Ala. 487; Bouton v. American Mut. L. Ins. Co. 25 Conn. 542; Sheldon v. Connecticut Ins. Co., 25 Conn. 207; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Southern L. Ins. Co. v. Kempton, 56 Ga. 339; Northwestern Mut. etc. Co. v. Umerman, 119 Ill. 329; overruling 16 Ill. App. 528; Home Life Ins. Co. v. Pierce, 75 Ill. 426; Protection L. Ins. Co. v. Foote, 79 Ill. 361; Davidson v. Young, 38 Ill. 152; Chicago

that receiving overdue premiums is merely an act of courtesy.[76] Thus, a custom to give short credits for premiums due may be construed as a waiver of the right to insist on the stipulation.[77] The fact of the acceptance of a quarterly premium, and of the payment of premium notes from one to four months after they are due during one year, does not establish such a custom that the assured may rely thereon in delaying payment the succeeding year.[78] So where more than half of all the premiums that fell due during the existence of the policy have been paid by the assured and accepted by the company after they have matured, and the last premium was paid about the same time as the others, the company is estopped to claim a forfeiture.[79] And if there has been a promise to accommodate the insured by giving time, and, relying thereon, the insured has been accustomed to delay paying premiums until after they were due, the company must give notice of discontinuance of such custom before it can claim a forfeiture.[80] Waiver

L. Ins. Co. v. Warner, 80 Ill. 410; Odd Fellows' Mut. Aid Assn. v. Sweetzer, 117 Ind. 97; 19 N. E. Rep. 722; Sweetzer v. Odd Fellows' Mut. Aid Assn., 117 Ind. 97; Phœnix Mut. L. Ins. Co. v. Honisley, 75 Ind. 1; Mound City etc. L. Ins. Co. v. Twining, 19 Kan. 349; Towle v. Ionia E. & B. Farmers' Mut. F. Ins. Co., 91 Mich. 219; 51 N. W. Rep. 987; Société de Bienfaisance v. Morris, 24 La. Ann. 347; Thompson v. Mutual L. Ins. Co., 52 Mo. 469; Appleton v. Phœnix Mut. L. Ins. Co., 59 N. H. 541; 47 Am. Rep. 220; Horn v. Cole, 51 N. H. 287; De Frece v. Union Mut. L. Ins. Co., 136 N. Y. 144; 43 N. Y. St. Rep. 805; Ruse v. Mutual B. L. Ins. Co., 26 Barb. (N. Y.) 556; Buckbee v. United States Ins. Co., 18 Barb. (N. Y.) 541; Whitehead v. N. Y. L. Ins. Co., 102 N. Y. 143; Equitable Ins. Co. v. McCrea, 8 Lea (Tenn.), 541; McCorkle v. Texas B. Assn., 71 Tex. 149; 8 S. W. Rep. 516; Tripp v. Insurance Co., 55 Vt. 100; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 54; Phœnix Ins. Co. v. Dister, 106 U. S. 30; New York L. Ins. Co. v. Eggleston, 96 U. S. 572; Spoeri v. Massachusetts Mut. L. Ins. Co., 39 Fed. Rep. 752; Unsell v. Hartford etc. Co., 32 Fed. Rep. 443; Hartford L. & Ann. Ins. Co. v. Unsell, 144 U. S. 439; 36 U. S. S. C. R. 496; 12 Supr. Ct. Rep. 671; 21 Ins. L. J. 48; Southern Mut. L. Ins. Co. v. McCain, 96 U. S. 84.

[76] Thompson v. St. Louis Ins. Co., 52 Mo. 469.

[77] Lebanon Mut. Ins. Co. v. Hoover, 113 Pa. St. 591; 57 Am. Rep. 511.

[78] Smith v. New England M. L. Ins. Co., 11 U. S. C. C. A. 411; 63 Fed. Rep. 769.

[79] Spoeri v. Massachusetts Mut. L. Ins. Co., 39 Fed. Rep. 752.

[80] Dillebar v. Knickerbocker L. Ins. Co., 76 N. Y. 567.

of the payment of premiums may be established by evidence of a custom of the agents of both parties to collect premiums on the first of the month for insurances effected the month prior thereto.[81] So where the company was accustomed to receive overdue payments of premiums without objection, and sent out letters with the words "every policy is nonforfeiting" printed thereon in prominent letters, the company is estopped to thereafter insist on a forfeiture for failure to make punctual payment of the premium.[82] And the rule applies where the notice of payment provides for forfeiture for default in prompt payment of the premium where the policy does not so provide, and a literal compliance with the requirement has not been exacted on any prior occasion.[83] So it may be legally inferred that the insured is justified in believing that prompt payment of premiums is unnecessary, where it appears that eighteen payments out of twenty-one have been paid and received without objection when overdue.[84]

§ **1357. Waiver—Holding Overdue Premium Notes and Demanding Payment.**—Holding overdue premium notes and demanding payment thereof does not establish a waiver of forfeiture where the contract stipulates that if said notes are not paid at maturity, the full amount of annual premiums shall be considered as earned and payable, and that the policy shall not be thereby revived.[85]

§ **1358. Custom not to Treat Nonpayment of Premium Notes as Forfeiture.**—The terms of the written contract cannot be varied by evidence of a general custom of the company not to treat nonpayment of premium notes when due as forfeiting the policy.[86]

[81] Potter v. Phœnix Ins. Co. (U. S. C. C. W. D. Mo. 1894), 63 Fed. Rep. 382.

[82] Home L. Ins. Co. v. Pierce, 75 Ill. 426.

[83] Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51.

[84] De Frece v. National L. Ins. Co., 136 N. Y. 144; 46 N. Y. St. Rep. 479.

[85] Union Cent. L. Ins. Co. v. Chowning (Tex. C. C. A. 1894), 28 S. W. Rep. 117.

[86] Union Cent. L. Ins. Co. v. Chowning (Tex. C. C. A. 1894), 28 S. W. Rep. 117.

§ 1359. Enforcing Payment of Note after Forfeiture. If the company never formally cancels the policy, and having full notice of the facts, enforces payment of the premium note, it waives a statutory requirement that the assured, in order to revive a policy after default, must pay his premium note before loss.[87]

§ 1360. Assured must have Known of Custom.—The assured must have known of a custom to receive overdue premiums, and have been induced by such custom to rely thereon, in order to avail himself thereof to establish a waiver.[88]

§ 1361. Payment of Assessments—Waiver and Estoppel, Custom, Acts, etc.—The rule stated in the last section is also applicable to the payment of assessments.[89] Thus, a habit of the company to receive overdue assessments estops the company to claim a forfeiture.[90] Where the constitution of a society provided that in case a member was suspended for nonpayment of assessments he could be reinstated upon payment of the assessments within four months, but that if an assessment remained due for more than four months he could only be reinstated by a vote of his lodge, the payment of all assessments, and the furnishing of a health certificate, and it appeared that the member had on several occasions let his assessments become overdue, but had paid them all within four months, except the last one, which he did not remit until more than four months from the date thereof, and then the officer to whom he sent it forwarded to the insured a copy of the constitution and by-laws, marking the provision as to reinstatement, but retaining the money, it was held to be a question for

[87] Bloom v. State Ins. Co. (Iowa, 1895), 62 N. W. Rep. 810; McClain's Code, sec. 1731.

[88] McGowan v. Supreme Coun. Cath. M. B. Assn., 76 Hun (N. Y.), 534; 58 N. Y. St. Rep. 268.

[89] National Mut. B. Assn. v. Jones, 84 Ky. 110; Insurance Co. v. Hennesly, 75 Ind. 1; Fowler v. Metropolitan L. Ins. Co., 41 Hun (N. Y.), 357; Illinois Mas. B. Soc. v. Baldwin, 86 Ill. 479; and cases cited under last section.

[90] Stylow v. Wisconsin Odd Fellows' M. L. Ins. Co., 69 Wis. 224.

the jury whether the requirement as to the health certificate and vote of the lodge had been waived.[91] And although the certificate is stipulated to be avoided by nonpayment of assessments within ten days after receiving notice, the association is estopped to claim a forfeiture for nonpayment within that time where it is its habit to receive payments within sixty days from notice,[92] although it is a question for the jury whether the facts proven constitute a waiver.[93] And the fact that the manager has promised to draw upon a member for an assessment, and has twice done so, estops the company to claim a forfeiture.[94] Although by custom of the office, known to the company, an agent has power to and does waive delay in payment of premiums, in case of assured's death before actual payment no recovery can be had.[95] If the association has at various times received assessments after the time specified for payment, and informs assured that the policy will not be forfeited for nonpayment after the day they became due, such acts constitute a waiver of a right to insist on forfeiture.[96] And where a director promised to pay an assessment for a member under a promise of repayment, but neglected to do so, it was held that there was no forfeiture.[97] But such promise by an agent known to have no authority to make the same does not so operate.[98] So a recognition of a policy holder as a member after he has refused to pay an assessment and failed to renew his policy waives the right, after the company becomes insolvent, to insist that his policy is forfeited.[99] But even

[91] Rice v. Grand Lodge (Iowa, 1894), 60 N. W. Rep. 726.

[92] Odd Fellows' Mut. Aid Assn. v. Sweetzer, 117 Ind. 97; 19 N. E. Rep. 722.

[93] Elnandorph v. Citizens' Mut. Ins. Co., 91 Mich. 36; 51 N. W. Rep. 926; Odd Fellows' Mut. Aid Assn. v. Sweetzer, 117 Ind. 97; 19 N. E. Rep. 722.

[94] McCorkle v. Texas B. Assn., 71 Tex. 149; 8 S. W. Rep. 516.

[95] Conway v. Phœnix Mut. L. Ins. Co., 140 N. Y. 79; 23 Ins. L. J. 231; 55 N. Y. St. Rep. 571.

[96] Loughbridge v. Iowa L. & Endowment Assn., 84 Iowa, 141; 50 N. W. Rep. 568.

[97] Van Houten v. Price, 38 N. J. Eq. 72.

[98] Co-operative Assn. v. McCormico, 53 Miss. 233.

[99] Conigland v. North Carolina M. Ins. Co., 98 Am. Dec. 89, 1 Phil. Eq. (N. C.) 341.

though there be a waiver, in such cases the payment must be made within a reasonable time after it becomes due.[100]

§ **1362. Waiver of Prepayment.**—A stipulation as to prepayment of the premium may be waived by the company.[101] Where the agent delivering the policy tells assured that payments may be made at the door, and several calls therefor being made without payment, and about six months thereafter, a fire having started in the same block, payment is made to and accepted by the agent, who does not at the time believe there is any danger to the insured premises, and forwards the premium at once to the insurer, the latter, however, having no knowledge of the threatened danger by fire, it is held that a finding by the jury in favor of the plaintiff might reasonably have been made.[102] Prepayment of premium is waived where the company's soliciting agent receives part of the money on delivery of the policy, and credit is given for the balance in a sum equivalent to the agent's commissions, notwithstanding provisions in the policy requiring payment of the money at the home office, and that a waiver must be in writing over the president's signature, and although the policy is canceled before loss for nonpayment of premium, the assured, however, not being notified thereof before loss.[103] If the contract stip-

[100] Girard L. Ins. Co. v. Mutual L. Ins. Co., 86 Pa. St. 236; 97 Pa. St. 15.

[101] German Ins. Co. v. Orr, 56 Ill. App. 637. Company may waive prepayment: Stoehlke v. Hahn, 158 Ill. 79. Nonpayment of first premium, when no estoppel against company: Union Bldg. Assn. v. Rockford Ins. Co., 83 Iowa, 647; 32 Am. St. Rep. 323. Prepayment is waived when: Griffith v. New York L. Ins. Co., 101 Cal. 627; 40 Am. St. Rep. 96. Delivery of the policy waives condition as to prepayment: Gosch v. State Mut. F. Ins. Co., 44 Ill. App. 263; Wytheville Ins. etc. Co. v. Teiger, 90 Va. 277; 18 S. E. Rep. 195. Prepayment of premium may be waived by an agent of the company where there is evidence that the company was aware of the practice of its agents so to do, and in its contract of agency had stipulated that such acts of the agent in crediting premiums were at their own risk: Smith v. Provident Sav. L. Assur. Co., 13 U. S. C. C. A. 284; 24 Ins. L. J. 502; 65 Fed. Rep. 765. This subject is further considered under the chapter on agency herein.

[102] Hargraves v. Home Ins. Co., 43 Neb. 272-75; 61 N. W. Rep. 611.

[103] Terry v. Provident Fund Ins. Co., 13 Ind. App. 1; 41 N. E. Rep. 18.

ulates that no risk is assumed by the insurer except for that portion of the year for which cash premiums in advance have been obtained, a forfeiture for nonpayment of premiums is not waived by the giving a note for said premium to an agent unauthorized to postpone payment, especially when there was never any acceptance by the company or knowledge thereof on its part.[104] If the company has often extended time to the insured and to others for payment on other policies, and part of the premium due is accepted when tendered, there is a waiver of prepayment.[105]

§ 1363. **Where Receipt of Premiums and Assessments is an Act of Favor.**—If a custom to allow a few days extra is proved to be merely a favor or act of courtesy, the company is not, in such case, precluded to insist upon the forfeiture,[106] although there would seem to be no valid reason why proof that the custom was only a courtesy or matter of favor should not appear by clear and satisfactory evidence to have been known to the assured to warrant such ruling, and we would suggest that the proof ought to exclude the conclusion that the assured was reasonably justified, by the acts of the assurer, in believing that he could safely delay payments, for if he was clearly misled by such custom to his injury, there ought to be an estoppel, as much so as in cases where such estoppel controls the express provisions of the policy or contract; for if the company has habitually received overdue assessments when tendered, it cannot at the same time avoid the effect of such acts, and continue its right to insist upon forfeiting a contract for nonpayment of assessments, either by printed notices or by verbal communications.[107] So a stipulation in an obscure part of the policy in small type that receipts of overdue premiums should form no precedent as to payment

[104] Smith v. New England M. L. Ins. Co., 11 U. S. C. C. A. 411; 63 Fed. Rep. 769.

[105] Nebraska & Iowa Ins. Co. v. Christiensen. 29 Neb. 572; 26 Am. St. Rep. 407.

[106] Jones v. National Mut. B. Assn. (Ky.), 2 S. W. Rep. 447; Servoss v. Western Mut. Aid Soc., 67 Iowa. 86.

[107] Odd Fellows' Mut. Aid Assn. v. Sweetzer, 117 Ind. 97; 19 N. E. Rep. 722.

of future premiums, but rather a qualification of the receipt of premiums, and where it does not appear when the same had been inserted, and that the company had failed to take advantage thereof in two former trials and one argument in error of the same case, it cannot be set up to establish a forfeiture,[108] and if the act be one of favor in that particular instance, there is no waiver.[109]

§ 1364. Waiver and Estoppel—Acceptance and Retention of Overdue Premiums and Assessments—Cases. If the company receives and retains past due premiums or assessments paid after the day specified in the policy, it renews the contract and waives forfeiture for nonpayment where such acceptance is unconditional and the facts known.[110] If money is received and retained by the company after the time for payment of an assessment has passed, and a conditional receipt is mailed therefor to assured, it must appear that it was received by assured in the absence of any stipulation for communication through the mails, otherwise there is a waiver of the default.[111] But the assessment must be received with knowledge of the facts. Thus, if the fact that the member is not in good standing in his local lodge is unknown at the time of the receipt of assessments or dues, there is no waiver,[112] and the waiver arising from such acts of acceptance and waiver after demand of an assessment cannot, where the money has been retained until after death, be avoided by proof of mistake in de-

[108] Girard etc. L. Ins. Co. v. New York M. L. Ins. Co., 97 Pa. St. 15.

[109] Illinois Masons' B. Soc. v. Baldwin, 86 Ill. 479.

[110] Jacobs v. National L. Ins. Co., 1 MacAr. (D. C.) 632; McQuirk v. Metropolitan L. Ins. Co., 56 Conn. 228; Smith v. St. Paul F. etc. Ins. Co., 3 Dak. 80; Erdmann v. Mutual Ins. Co. of O. of H. Sons, 44 Wis. 376; Tripp v. Vermont L. Ins. Co., 55 Vt. 100; Millard v. Supreme Coun. American Legion of Honor, 81 Cal. 340; 22 Pac. Rep. 864. Wyman v. Phœnix Mut. L. Ins. Co., 45 Hun (N. Y.), 184; United Brethren Mut. Aid Soc. v. Schwartz (Pa.), 12 Cent. Rep. 728; 81 Am. Dec. 689; Rice v. New England Mut. Aid. Soc., 146 Mass. 248; 5 N. E. Rep. 624; Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

[111] Shea v. Massachusetts B. Assn., 160 Mass. 289; 23 Ins. L. J. 214; 35 N. E. Rep. 855.

[112] Springnieer v. Benevolent Assn., 5 Cin. L. Bull. 516.

manding and receiving the assessment.[113] But if the assured, seven months after default in payment of premiums, sends the amount due with a letter from the company's medical examiner as to his health, and demands a receipt for said money, and the company does not return the money but credits him therewith, and immediately writes both him and its local agent, insisting on a medical examination, there is a waiver, even though assured dies of consumption six days after writing the letter, he having no knowledge of the company's last letter.[114] If a local agent receives an overdue assessment with knowledge of the fact, and forwards it to the company, which receives it, and after loss adjusts the same, it is a waiver.[115] So the acceptance and retention by the society of assessments paid by a member, the company knowing that he is in default and taking no action to effect a legal suspension under the by-laws, waives the default and forfeiture.[116] And the forfeiture is waived by the tender and acceptance of part of the amount of an overdue premium,[117] and the tender and acceptance as payment of the premium due on a certain day continues the policy in force, notwithstanding previous premiums may be remaining unpaid.[118] But the forfeiture is held not to be waived by the collection of previous assessments.[119] So there is no waiver where the company refuses to accept, but returns, such assessments to its local agent, who has received them subject to its rejection.[120] And although dues had in former years been received when in arrears, there is no waiver where the insured

[113] Bailey v. Mutual B. Assn., 71 Iowa. 689; 27 N. W. Rep. 770; Georgia Masonic Mut. L. Ins. Co. v. Gibson, 52 Ga. 640. See Modern Woodmen of America v. Jameson, 49 Kan. 677; 30 Pac. Rep. 460; 21 Ins. L. J. 711; reversing 29 Pac. Rep. 473.

[114] Rasmusen v. New York L. Ins. Co. (Wis. 1895), 64 N. W. Rep. 301.

[115] Farmers' Mut. etc. Co. v. Buven, 40 Mich. 147.

[116] Daniker v. Grand Lodge A. O. U. W., 10 Utah, 110; 37 Pac. Rep. 245. See Lycoming etc. Ins. Co. v. Schollenberger, 44 Pa. St. 259.

[117] Hodson v. Guardian L. Ins. Co., 97 Mass. 144; Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111. But see sec. 1114, herein.

[118] Butler v. American Popular L. Ins. Co., 42 N. Y. Sup. Ct. 342.

[119] Nash v. Union Ins. Co., 43 Me. 343.

[120] United Brethren Mut. Aid Soc. v. Schwartz (Pa.), 12 Cent. Rep. 728.

never paid nor tendered the dues until long after he was told that the insurer would insist on the forfeiture;[121] nor is the condition in an insurance policy as to prompt payment of the premiums waived as to other premiums by the acceptance of a note for the first and an extension of time thereon.[122] So a demand for an overdue premium without its payment is not sufficient to reinstate a policy which by its terms is forfeited by a failure to pay promptly, although demand and payment does reinstate.[123] The question as to waiver of forfeiture by retaining assessments an unreasonable length of time is one of fact for the jury.[124]

§ 1365. Right or Obligation to Accept and Retain Overdue Premium or Assessment—No Waiver.—If the company has by the terms of the contract, or of the charter or by-laws or articles of association, included therein a right to demand and receive overdue assessments, such act does not operate as a waiver of forfeiture, nor estop the company from insisting thereon.[125] Thus if the contract provides for suspension of the risk during the time the premium note remains overdue and unpaid, but is also conditioned that the policy may be revived on subsequent payment, the receipt of partial payments on the note does not operate as a waiver of the forfeiture arising from default in payments, nor render the company liable for a loss occurring after such default, for the company is obligated under the contract to receive payment on the note when tendered, and the policy is not revived until full payment is made.[126] So where the policy provides that upon default in payment as stipulated of installments due, the policy shall cease and the premium be considered as earned, the de-

[121] Mandego v. Centennial Mut. L. Assn., 64 Iowa, 134; 19 Ins. L. J. 660; 17 N. W. Rep. 656.

[122] Mobile L. Ins. Co. v. Pruett, 74 Ala. 487.

[123] Cohen v. Continental F. Ins. Co., 67 Tex. 325; 60 Am. Dec. 24; Edge v. Duke, 18 L. J. Ch. 183.

[124] Matt v. Roman Catholic Prot. Soc., 70 Iowa, 455; 30 N. W. Rep. 799 (finding of no waiver in this case).

[125] See sec. 1258, herein, and c. xxxi, herein, on premium, etc., notes.

[126] Carlock v. Phœnix Ins. Co., 138 Ill. 210; 28 N. E. Rep. 53.

mand, payment, and acceptance of the premium constitutes no waiver.[127]

§ **1366. Unconditional Offer to Accept Overdue Premium—Tender.**—An unconditional offer by the company to accept at a future time an overdue premium, with a tender of payment in pursuance of such offer, operates to waive a forfeiture for the nonpayment.[128]

§ **1367. Conditional Acceptance of Overdue Premiums, etc.**—Although the policy may be forfeited or suspended by default in payment of premiums or assessments, and overdue premiums or assessments may be received conditionally, as in case they are accepted provided the assured be alive and in good health, the required conditions as to life or health must exist to warrant a continuance of the policy, or its revival, or a waiver of the forfeiture, or reinstatement of the member, and the same rule applies to a custom to receive overdue payments conditionally, for in such case the conditions must exist to constitute a waiver.[129] Thus, although several overdue premiums have been received, or if they have been habitually received, yet if they have always been accepted on the express condition that the assured is in good health and that the acceptance of such overdue payments is wholly optional with the company, there is no waiver of forfeiture where the insured is not in good health;[130] and if the member is required to furnish a certificate of health, this constitutes a condition upon which payment can only be made.[131] If after nonpayment of

[127] Cohen v. Continental L. Ins. Co., 67 Tex. 325; 3 S. W. Rep. 296. See Joliffe v. Madison etc. Ins. Co., 39 Wis. 111; Shultz v. Hawkeye Ins. Co., 42 Iowa, 239.

[128] Murray v. Home B. L. Assn., 90 Cal. 402; 25 Am. St. Rep. 133.

[129] Want v. Blunt, 12 East, 183; Servoss v. Western Mut. Aid Soc., 67 Iowa, 86; Unsell v. Hartford L. & Ann. Ins. Co., 32 Fed. Rep. 443; Hartford L. & Ann. Ins. Co. v. Unsell (U. S. S. C. 1892), 12 Supr. Ct. Rep. 671; 21 Ins. L. J. 481; Lewis v. Phœnix Mut. L. Ins. Co., 44 Conn. 73; Harris v. Equitable L. Assur. Soc., 3 Hun (N. Y.), 724; 6 N. Y. St. Rep. 108.

[130] Mutual L. Ins. Co. v. Girard L. Ins. Co., 100 Pa. St. 172; Crossman v. Massachusetts B. Assn., 143 Mass. 435.

[131] Crossman v. Massachusetts B. Assn., 143 Mass. 435; Servoss v. Western Mut. Aid Soc., 67 Iowa, 86.

an assessment when due a duplicate notice is sent, stating that the forfeited certificates may be renewed by immediate payment and the receipt thereof at the home office, if the association approves the risk and the assured pays said assessment and receives a receipt therefor, conditioned that assured is in good health, as he then was, there is a waiver of forfeiture.[132] And if the facts are such that the satisfactory evidence of good health" provided for by the by-laws could not have been furnished, and the receipt given for the assessment is conditioned that the assured should be living, of temperate habits, and in good health, as when made, a member, there is no waiver.[133] But in another case a life insurance company, being estopped by its contract to insist on a forfeiture of a policy for nonpayment of premiums, agreed with the assured to receive the overdue premiums and restore the policy, if a medical re-examination should be satisfactory, and if not, to refund the premiums so received. The assured paid the overdue premiums, but the medical re-examination was unsatisfactory. The company declined to revive the policy or refund the premiums so paid, and it was held that the assured might be reinstated in the position he occupied when the agreement was entered into.[134] And it has been rather broadly held that there was a waiver both of the condition of the certificate and also of prompt payment,[135] where a provision in the by-laws stipulated that overdue payments of assessments would be accepted only on the presentation of a certificate of good health, and the last three payments prior to the death of the insured had been accepted a day or two after maturity without such certificate, and the last payment was not made at the time the insured died, five days after time of payment had expired. And the same ruling was made where an overdue assessment was collected and the

[132] Sieberg v. Massachusetts B. L. Assn., 87 Hun (N. Y.), 199; 67 N. Y. St. Rep. 750.

[133] Ronald v. Mutual Reserve Fund L. Assn. (N. Y. C. A. 1892), 44 N. Y. St. Rep. 407; 30 N. E. Rep. 739; 21 Ins. L. J. 634.

[134] Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; 29 Am. Rep. 200; Appleton v. Phœnix Mut. L. Ins. Co.,59 N. H. 541; 47 Am. Rep. 220.

[135] Painter v. Industrial L. Assn., 131 Ind. 68; 30 N. E. Rep. 876.

receipt provided that it was "received on condition that the member is in good health," and six assessments were subsequently levied and unconditionally received by the company thereafter, even though at the time of the conditional acceptance the member was in ill health.[136] So if the company being cognizant of the actual state of health of the insured, or if there is no fraud practiced in concealing the same from the company, the acceptance and retention of the payment constitutes a waiver, even though the receipt provides that it is only binding on condition that the assured is in good health, unless the money be paid within the time specified under the notice.[137] Although the premium is past due, yet if the company receives and retains it, there is a waiver of the forfeiture, even though the company wrote to the assured after the money was in its hands that he must send a certificate or his own statement of good health. And in such case a verdict for recovery on the certificate will be sustained.[138] Although assured pays an assessment, nevertheless he may question its validity, it having been conditionally received by the society.[13]

§ 1368. When Custom to Receive Overdue Payments may be Availed of by Insured—General Custom—Proof. Evidence of the acceptance of one single overdue premium or assignment, or of a few separate instances, is insufficient of itself to establish a waiver of forfeiture claimed for nonpayment of a subsequent premium or assessment.[140] But three continuous payments of overdue assessments preceding the last made

[136] Rice v. New England Mut. Aid Soc., 146 Mass. 248; 15 N. E. Rep. 624. See, also, Stylow v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 69 Wis. 224; 34 N. W. Rep. 151.

[137] Stylow v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 69 Wis. 224; 34 N. W. Rep. 141.

[138] Rockwell v. Mutual L. Ins. Co., 27 Wis. 372; 20 Wis. 335. But in the same case, 21 Wis. 548, it was held a question for the jury whether the money was taken upon condition that the member was in good health.

[139] Shea v. Massachusetts B. Assn., 160 Mass. 289; 23 Ins. L. J. 214; 35 N. E. Rep. 855.

[140] Marston v. Massachusetts Mut. L. Ins. Co., 59 N. H. 92; Bosworth v. Western Mut. Aid Soc., 75 Iowa. 582; 39 N. W. Rep. 903; Wilcutt v. Northwestern Mut. etc. Co., 81 Ind. 301; Mobile L. Ins. Co. v. Parett, 74 Ala. 487.

and accepted have been held sufficient to establish a waiver.[141] And the acceptance by the secretary, who is authorized to collect assessments of the amount due at various times after the expiration of the specified days of payment, constitutes a waiver of forfeiture.[142] If there is a custom to charge premiums on renewals or new policies, and have periodical settlements with insured under an arrangement with him to that effect, it may be implied that credit is given for premiums so charged until the next settlement.[143] The rule stated in a prior section presupposes such an habitual and uniform custom as to warrant the presumption that the insured was justified in believing that he could safely delay payment, notwithstanding the terms of his contract; such custom as is shown by an examination of the cases may have extended over a number of years, and the instances may not have occurred consecutively, or it may have covered only a comparatively short period of time, or there may have been several consecutive instances immediately preceding the time of payment of the last premium or assessment, so those paid when overdue may have sustained such a proportion to the whole number of payments during a given period of time as to warrant the presumption of a waiver.[144] Evidence is held admissible on behalf of the insured to show a custom or usage among insurance companies to receive premiums within a reasonable time after they fall due, under policies similar to that in suit, if the insured be in good health, notwithstanding the policies contain a clause of forfeiture for nonpayment of premiums on the very day they are due.[145] But a custom to receive assessments after default

[141] Painter v. Industrial L. Assn., 131 Ind. 68; 30 N. E. Rep. 876.

[142] Loughbridge v. Iowa L. & Endowment Assn., 84 Iowa, 141; 50 N. W. Rep. 568.

[143] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549; 35 N. E. Rep. 1060.

[144] See cases cited under sec. 1361, herein, and Crossman v. Massachusetts B. Assn., 143 Mass. 435.

[145] Girard L. Ins. etc. Co. v. New York Mut. L. Ins. Co., 97 Pa. St. 15; 100 Pa. St. 72. See, also, Helme v. Philadelphia Ins. Co., 61 Pa. St. 107; Mayer v. Mutual etc. Co., 38 Iowa, 304; 18 Am. Dec. 34; Thompson v. St. Louis Mut. F. Ins. Co., 52 Mo. 469. In this case the instruction to the jury by the lower court admitting evidence of usual delay in the payments was sustained upon appeal.

cannot be availed of unless the member knew of such custom, or had been indulged in that manner a number of times. The mere fact that it had been granted to others is also held insufficient.[146] And where no general custom of waiving such defaults is shown to exist, and it does not appear that deceased had any knowledge of such custom, if any, and there is no evidence of waiver as to himself except in a few instances, a finding in favor of the company will not be disturbed.[147] Evidence of such general usage, is, however, held inadmissible in other cases;[148] although it is held that evidence of a custom to give credit for fire insurance premiums in other cases may be shown in connection with evidence that the company or its authorized agent had given credit to the insured on previous occasions.[149] A finding by the jury of waiver will not be disturbed when based upon the fact of a custom of the company to frequently accept overdue premiums sent to the broker.[150]

§ 1369. Waiver of Forfeiture Generally by Receipt of Overdue Premiums, Assessments and Dues.—If a forfeiture has occured for breach of any condition in the policy or of the contract in a mutual benefit society, and the company thereafter, with knowledge of the facts, unconditionally accepts and retains a premium or assessment, it thereby waives the former forfeiture, and the company is estopped thereafter

[146] McGowan v. Supreme Council etc. B. Assn., 75 Hun (N. Y.), 534; 28 N. Y. Supp. 177; citing Appleton v. Insurance Co., 59 N. H. 541; Crossman v. Association, 143 Mass. 435; 9 N. E. Rep. 753. See, also, Schwartz v. Germania L. Ins. Co., 18 Minn. 448; Taylor v. Ætna L. Ins. Co., 13 Gray (Mass.), 434; Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619; Redfield v. Patterson F. Ins. Co., 6 Abb. N. C. (N. Y.) 456.

[147] Bosworth v. Western Mut. Aid Soc., 57 Iowa, 582; 39 N. W. Rep. 903.

[148] Insurance Co. v. Sefton, 53 Ind. 380; Howell v. Knickerbocker L. Ins. Co., 44 N. Y. (5 Hand.) 276; 4 Am. Rep. 675; Sheldon v. Atlantic F. Ins. Co., 26 N. Y. 460; Lewis v. Phœnix Mut. etc. Co., 44 Conn. 72; Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619; Redfield v. Paterson F. Ins. Co., 6 Abb. N. C. (N. Y.) 456.

[149] Wood v. Poughkeepsie Ins. Co., 32 N. Y. 627, per Davis, J. And see cases under last note.

[150] Estes v. Home Mfrs. etc. Ins. Co. (N. H.), 33 Atl. Rep. 515.

from setting up the grounds of forfeiture as a defense,[151] and this is so even though a former assessment had been received conditionally;[152] and so although the policy provides that nothing less than a distinct specific agreement indorsed on the policy shall constitute a waiver of any condition therein.[153] And a receipt of the premium is a waiver of concealment,[154] of misrepresentations generally,[155] of misrepresentations as to age in a life policy,[156] of removal of residence,[157] of engaging in prohibited occupation,[158] of alleged fraud in procuring the policy,[159] of a defense that the policy never attached where the claim is first made after loss,[160] of change in habits of assured after notice thereof[161] of prohibited use of a building,[162] and of

[151] McGurk v. Metropolitan L. Ins. Co., 56 Conn. 528; North Berwick F. Co. v. N. E. F. & M. Ins. Co., 52 Me. 336; Weed v. London & L. F. Ins. Co., 116 N. Y. 106; Lycoming F. Ins. Co. v. Schollenberger, 44 Pa. St. 259; Tuttle v. Robinson, 33 N. H. 104; Rice v. New England Mut. Aid Soc., 146 Mass. 248; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Gans v. St. Paul etc. Ins. Co., 43 Wis. 108; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Fitzpatrick v. Hartford L. & Ann. Ins. Co., 56 Conn. 116; Schwartzbach v. Ohio Valley Prot. Union, 25 W. Va. 622; Northwestern Mut. L. Ins. Co. v. Amerman, 16 Ill. App. 528; Viele v. Germania etc. Ins. Co., 26 Iowa, 9; Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183; Lycoming F. Ins. Co. v. Stockblower, 26 Pa. St. 199; Rathbone v. City F. Ins. Co., 31 Conn. 194; Wing v. Hawey, 5 De Gex, M. & G. 265; Farmers' etc. Ins. Co. v. Bowen, 40 Mich. 147; Rindge v. N. E. Mut. Aid Soc., 146 Mass. 286; Story v. Hope Ins. Co., 37 La. Ann. 254; Commercial Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582.

[152] Rice v. New England Mut. Aid Soc., 146 Mass, 248, and cases cited.

[153] Story v. Hope Ins. Co., 37 La. Ann. 254.

[154] Armstrong v. Turquand, 9 Ir. C. L. 32; 3 Irish Jur., N. S., 450.

[155] Fitzgerald v. Hartford L. & Ann. Ins. Co., 56 Conn. 116; Hoffman v. Supreme Council, 35 Fed. Rep. 252; Wetherell v. Marine Ins. Co., 49 Me. 200; Schwartzbach v. Protection Union Soc., 25 W. Va. 622.

[156] Gray v. National B. Assn., 111 Ind. 531; Morrisson v. Odd Fellows' etc. Soc., 59 Wis. 162.

[157] Germania Ins. Co. v. Rudwig, 80 Ky. 223.

[158] Home L. Ins. Co. v. Pierce, 75 Ill. 426.

[159] Armstrong v. Turquand, 9 Ir. Law, N. S., 32; 3 Irish Jur., N. S., 450.

[160] Powell v. Factors' etc. Ins. Co., 28 La. Ann. 19.

[161] Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183; 7 Supr. Ct. Rep. 500.

[162] Keenan v. Dubuque etc. Ins. Co., 13 Iowa, 375.

ill-health of assured.[163] So the acceptance of an additional premium for an increase of risk may waive a forfeiture.[164] So in a case where membership in a mutual benefit society was dependent upon the continuance of membership in another order, the receipt of dues by the society from a member after his withdrawal from such order does not constitute a waiver of forfeiture of good standing, where such fact of withdrawal is not known to the society nor its officers.[165] But the society, by accepting and retaining dues and fees under a beneficiary certificate with knowledge waives all irregularity in admission of the applicant to membership therein, as well as in the organization of the subordinate lodge.[166] Where an open river policy includes all merchandise to be shipped to and from plaintiff to and from all ports, and there is attached a cotton and produce contract, returns to be made of all produce shipped, and the contract is to be avoided for failure to do so, and this is not done, and the company afterward receives the premiums without raising any question of forfeiture of the produce contract, nevertheless the plaintiff cannot recover.[167] Nor does the acceptance of a premium waive engaging in a prohibited occupation where the insured is told at the time by the company's agent who received the money that it would not protect him in case of death before change of the employment.[168]

§ 1370. Waiver by Collecting Assessments on Notes or by Collecting or Suing on Notes.—Making and collecting assessments upon the premium note for losses which accrued prior to the forfeiture are not a waiver of it.[169] If with knowledge of an act of forfeiture an insurance company makes and collects assessments on premium notes, the forfeiture of

[163] Rice v. New England Mut. Aid Soc., 146 Mass. 248.

[164] North Berwick Co. v. New England F. & M. Ins. Co., 52 Me. 336, per the court.

[165] Burbank v. Boston Police Relief Assn., 144 Mass. 434.

[166] Perine v. Grand Lodge A. O. U. W., 48 Minn. 82; 50 N. W. Rep. 1022; 21 Ins. L. J. 213.

[167] Palmer v. Factors' etc. Ins. Co., 33 La. Ann. 1336.

[168] Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329

[169] Smith v. Saratoga Mut. Ins. Co., 3 Hill (N. Y.), 508.

the policy is thereby waived.[170] But the assured cannot set up his own default to work a forfeiture.[171] Where the premium notes are payable absolutely, whether the policies have been forfeited or not, an acceptance of a payment after a loss of which the company has notice is not a waiver of any forfeiture,[172] especially where the company has refused to pay the loss because of forfeiture of the policy for breach of condition. Thus acceptance of money due on a note six weeks after the loss and after commencement of suit does not waive a forfeiture for a previous breach of condition of the policy.[173] So if the contract stipulates that the note for the premium shall be collectible even in case of loss, and that legal proceedings shall not revive the policy, the forfeiture arising from nonpayment of the note when due is not waived by collecting the amount thereof.[174]

§ 1371. Whether Levy and Receipt of Subsequent Assessments and Dues Waives Forfeiture.—The cases are not in harmony on this question. Many of the decisions which seem directly in point will be found, upon examination, to have relied upon authorities which do not support the doctrine of that case, for the reason that the cited cases have not rested upon the sole question whether a levy of subsequent assessments constitutes a waiver of forfeiture; but there have been other circumstances in proof which, together with the fact of such subsequent levy, have been held to warrant a forfeiture or not, as the case may be. Again, it has been declared that after a breach of condition and consequent forfeiture the

[170] Mackenzie v. Planters' Ins. Co., 9 Heisk. (Tenn.) 261; Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. St. 499; 20 Atl. Rep. 502, 505; Viall v. Genesee Mut. Ins. Co., 19 Barb. (N. Y.) 440. See next section herein.

[171] Susquehanna Mut. F. Ins. Co. v. Leavy, 136 Pa. St. 499; 20 Atl. Rep. 502, 505.

[172] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Neeley v. Onondago Co. Mut. Ins. Co., 7 Hill (N. Y.), 49.

[173] Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354; 13 West. Rep. 857; 16 N. E. Rep. 229.

[174] Shakey v. Hawkeye Ins. Co., 44 Iowa, 540; Life Ins. Co. v. Pendleton, 112 U. S. 696; Wheeler v. Life Ins. Co., 82 N. Y. 543; Curtin v. Phœnix Ins. Co., 78 Cal. 619; 21 Pac. Rep. 370.

rights of the parties have become fixed as in case of a lease which has become ipso facto void by the condition, where no acceptance of rent afterward can give it countenance.[175] In other cases, by the very stipulations of the contract the assurer has the right to levy and collect assessments after forfeiture or suspension without subjecting itself to the claim of waiver of its exemption from liability from the forfeiture; as in case of premium and like notes, or where the premium is stipulated to be considered as earned; or the assessment may be levied under such conditions that a waiver, which might otherwise exist, cannot be based thereon; as where a resolution of the board of directors provides that notice be given to enable delinquent members to reinstate themselves, and the testimony shows such fact, and that the notice was sent for that purpose only, and the same is uncontradicted. Here there is no waiver of forfeiture by sending notices of assessments subsequently levied after others are overdue and unpaid.[176] There are, however, numerous cases which hold that if the assured has been delinquent in the payment of assessments, or there has been a breach of some other condition in the policy, the levy of subsequent assessments by the company for a subsequently occurring loss constitutes a waiver of forfeiture, provided the insurer has knowledge of all the facts involved.[177] We believe this to be the correct rule, provided, however, that the contract does not otherwise stipulate, that there has been no mistake, and that the acts of levying and receipting such subsequent assessments are not done under such circumstances that it is apparent that no waiver was intended, and that no agreement or estoppel could be based thereon.

§ 1372. Same Subject—Authorities Holding a Waiver. If a mutual insurance company, with full knowledge of the falsity of a warranty, assesses the premium note, it is estopped

[175] See Gardiner v. Piscataquis Mut. F. Ins. Co., 38 Me. 439.

[176] Mutual Protection L. Ins. Co. v. Lawry, 84 Pa. St. 43.

[177] Odd Fellows' Mut. Aid Assn. v. Sweetzer, 117 Ind. 97; 19 N. E. Rep. 722; Tuttle v. Robinson, 33 N. H. 104; Masonic Mut. etc. Soc. v. Beck, 77 Ind. 203; Sands v. Hill, 42 Barb. (N. Y.) 651; Riswell v. Equitable Aid Union, 13 Fed. Rep. 840; Cumberland Valley Mut. Prot. Co. v. Mitchell, 48 Pa. St. 374; Erdmann v. Mutual Ins. Co.,

from setting up the false warranty as a defense.[178] Thus in Iowa the sending of notices of other assessments after default in prior payments, said notices requesting payment within a specified time to avoid suspension, extends the time of payment of overdue assessments, notwithstanding a provision in the certificate to the contrary.[179] So in Michigan, a mutual company having full knowledge of the facts may waive a forfeiture, as may also those authorized to act for it, and where an assessment was set down opposite the policy in suit in the company's assessment-book, and the notice of assessment was the same number, and it was claimed that the assessment was actually made on another policy of the plaintiff, it was held a question for the jury whether such assessment waived a forfeiture arising from claimed misrepresentations.[180] So subsequent assessments after delinquencies in paying, coupled with the acceptance by the company of assessments from another member sent in the same letter with that of the member after his death, waives the right to declare a forfeiture after death.[181] And where sixty-four consecutive assessments have with one exception been paid when overdue and unconditionally received, and two subsequent assessments are made, which remain unpaid and overdue when still another one is levied by the company it thereby waives the right to insist upon a forfeiture, although the last three assessments are unpaid at the member's death.[182] So the acceptance of past due assessments and levying other assessments constitutes a waiver.[183] Again it is held that if no notice is given that the pre-

44 Wis. 376; Farmers' Mut. Relief Assn. v. Koontz, 4 Ind. App. 538; 30 N. E. Rep. 145.

[178] Frost v. Saratoga Mut. Ins. Co., 5 Denio (N. Y.), 154.

[179] McGowan v. Northwestern Legion of Honor (Iowa, 1896). 67 N. W. Rep. 89.

[180] Towle v. Ionia E. & B. Farmers' Mut. F. Ins. Co., 91 Mich. 219; 51 N. W. Rep. 987.

[181] Railway Pass. & F. C. M. Aid etc. Assn. v. Swartz, 54 Ill. App. 445.

[182] Stylow v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 69 Wis. 224; 34 N. W. Rep. 151.

[183] Millard v. Supreme Coun. American Legion of Honor, 81 Cal. 340; 22 Pac. Rep. 864.

mium is due from the beneficiary, the contract of insurance being repudiated by the company, it is estopped to claim a forfeiture where it sends notice, according to its custom, to others, and the agent refuses to receive the premium.[184] So a levy and acceptance unconditionally of six subsequent assessments will waive a forfeiture.[185] A forfeiture for the nonpayment of a premium note is inconsistent with a subsequent demand for its payment and a notice that if not paid suit will be instituted therefor.[186] And levying and collecting a subsequent assessment waives nonpayment on time of prior ones,[187] or of a forfeiture.[188] So if the society continues to receive assessments after the member has been suspended, it is estopped to deny his good standing,[189] and if the company levies and receives such subsequent assessments, and retains the same until after the member's decease, it waives a forfeiture arising from nonpayment of prior assessments, even though the company did not discover the failure to pay said prior assessments.[190]

§ 1373. Same Subject—Authorities Contra.—Other cases hold that the subsequent levy of an assessment does not

[184] Sullivan v. Industrial B. Assn., 73 Hun (N. Y.), (1894), 319; 56 N. Y. St. Rep. 4.

[185] Rice v. New England Mut. Aid Soc., 146 Mass, 248; 15 N. E. Rep. 624.

[186] Marden v. Hotel Owners' Ins. Co., 85 Iowa, 584; 39 Am. St. Rep. 316.

[187] Roswell v. Equitable Aid Union, 13 Fed. Rep. 840.

[188] Watson v. Centennial Mut. etc. Co., 21 Fed. Rep. 698; Phœnix Ins. Co. v. Slaughter, 12 Wall. (U. S.) 404; Masonic Mut. Aid etc. Soc. v. Beck, 77 Ind. 203.

[189] Hoffman v. Legion of Honor, 35 Fed. Rep. 252.

[190] Tobin v. Western Mut. Aid Soc., 72 Iowa, 261; 33 N. W. Rep. 663. See Modern Woodmen of America v. Jameson, 48 Kan. 718; 30 Pac. Rep. 460; 21 Ins. L. J. 711; reversing 29 Pac. Rep. 473. Retention of overdue payments and levying subsequent assessments waives forfeiture: Great Western Mut. Aid Assn. v. Colmar (Colo. App. 1895), 43 Pac. Rep. 159. That a forfeiture is waived by the subsequent collection of premiums or assessments, or by the levy of assessments, see McKinney v. German Mut. F. Ins. Soc., 89 Wis. 653; 46 Am. St. Rep. 861, and cases noted on p. 863.

waive the forfeiture,[191] and it is so held where the policy has been suspended.[192] So a forfeiture of a policy of insurance for breach of warranty is not waived by a subsequent assessment of the forfeited policy and the payment by the insured of the assessment, where the assessment has been made by mistake.[193] So where a resolution of the board of directors provides that notice be given to enable delinquent members to reinstate themselves, and the testimony shows such fact and is uncontradicted, there is no waiver of forfeiture by sending notices of assessments subsequently levied after others are overdue and unpaid.[194] So if the assessment is for a loss occurring prior to the forfeiture, there is no waiver,[195] or if the assessment is made after an assignment, it does not waive the forfeiture arising therefrom when made for losses occurring prior thereto;[196] and where the policy is avoided by an increase of risk, the subsequent levy and collection of an assessment constitutes no waiver.[197] Nor is there any answer in such cases where the company has no knowledge of the facts on which the claimed breach of condition is based.[198] And where by the contract the policy was to be invalid while assessments were overdue and unpaid, the mere sending of a notice of assessment by an agent was held not to constitute a waiver of default.[199]

[191] Crawford Co. Mut. Ins. Co. v. Cochran, 88 Pa. St. 230; Philbrook v. N. E. Ins. Co., 37 Me. 137.

[192] Nash v. Union Mut. Ins. Co., 43 Me. 343; Crawford Co. Mut. etc. Co. v. Cochran, 88 Pa. St. 230.

[193] Diehl v. Adams Co. M. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302; Elliott v. Lycoming etc. Ins. Co., 66 Pa. St. 22.

[194] Mutual Protection L. Ins. Co., 84 Pa. St. 43.

[195] Viall v. Genesee Ins. Co., 19 Barb. (N. Y.) 440; Finley v. Lycoming Ins. Co., 30 Pa. St. 311.

[196] Smith v. Saratoga Mut. F. Ins. Co., 3 Hill (N. Y.), 508.

[197] In this case, however, the assessment was made after the loss of the property by fire and for losses occurring before the fire: Gardiner v. Piscataquis Mut. F. Ins. Co., 38 Me. 439.

[198] Gilbert v. North American F. Ins. Co., 23 Wend. (N. Y.) 43.

[199] This case seems to have turned upon the fact, held material by the court, that it did not appear that the assessment was levied by the company intending to recognize the policy as being then in force, nor that it authorized sending the notice, although the assessment was in fact levied upon policies then in force: Leonard v. Lebanon Mut. Ins. Co., 3 Week Not. Cas. 527.

§ 1374. Waiver—Custom—Acceptance of Premium or Assessment after Loss or Death.[200]—If there has been habitual custom to receive premiums at other times than the stipulated day, a payment within a reasonable time after it is due, according to custom, is good, and the policy is not forfeited, even though the insured is fatally sick at the time of the last payment and the company does not know of the sickness,[201] and so even though death has occurred after maturity and before actual payment,[202] and so notwithstanding the home agent inserted a statement in the last receipt, which was not in former receipts, that the policy-holder was in good health;[203] and in such case a recovery is not barred by the fact that no tender of the premium was made after the death,[204] and the receipts of arrears from the beneficiary after a default in payment of the premium prevents a lapse of the policy.[205] But there is no waiver if neither the officers receiving the assessments nor the company had knowledge of the facts constituting the ground of forfeiture.[206] Although a receipt of assessments voluntarily paid for the assured after his death to his lodge, and forwarded to the society, and accepted and retained by it, with knowledge of the death, until suit brought to recover on the policy, waives a forfeiture.[207] So the demand and receipt of assessments by a life insurance company after the death of the insured, with knowledge of his death, and that the contract is voidable on account of misrepresentations by the insured, waives the forfeiture.[208] So a mutual fire company is estopped to deny its liability when after the death of the assured it assesses his administrator upon the

[200] See sec. 1117, herein.

[201] Cotton States L. Ins. Co. v. Lester, 62 Ga. 247.

[202] Mayer v. Mutual L. Ins. Co. of Chicago, 38 Iowa, 304; Spoeri v. Massachusetts Mut. L. Ins. Co., 39 Fed. Rep. 752.

[203] Cotton States L. Ins. Co. v. Lester, 62 Ga. 247.

[204] Hanley v. Life Assn. of America, 4 Mo. App. 253.

[205] Arnott v. Prudential Ins. Co. of America, 44 N. Y. St. Rep. 480; 17 N. Y. Supp. 710; 63 Hun (N. Y.), 628.

[206] Swett v. Relief Soc., 78 Me. 541.

[207] Erdmann v. Mutual Ins. Co. of the O. of H. S., 44 Wis. 376.

[208] Masonic Mut. B. Assn. v. Beck, 77 Ind. 203; 40 Am. Rep. 295; Bailey v. Mutual B. Assn., 71 Iowa, 689; 27 N. W. Rep. 770.

policy and receives payment from him.[209] So where a premium is accepted after loss of the property with knowledge of the loss, there is a waiver of default for nonpayment.[210] But a retention of the premium till after death, there being no knowledge of the facts, constitutes no waiver.[211] So also of a payment received in ignorance of the death.[212] And where an overdue premium is to be accepted only on condition that it be paid at once, and the same is not sent until a fortnight later, the insured then being sick and having died the next day, the company is not bound by its acceptance and receipt.[213] When the premium is earned and forfeiture occurs before the loss, taking and retaining the premium does not constitute a waiver of the forfeiture nor evidence tending to show it.[214]

§ 1375. Waiver—Payment of Premium Note—Generally. The determination of the question whether the acceptance of payment, after death or loss, of a promissory note given an insurance company operates as a waiver of a prior forfeiture or exemption from liability of the insurer, depends upon the character of the note and the nature and terms of the contract. Thus, as we have stated in preceding sections, there may be a liability on a premium note after loss; or a liability to pay the whole note may be incurred by default in payment of an assessment; or the contract may provide for the deduction of the amount due on the note from the loss; or the note may be given for the premium on an open marine policy to become valid as fast as premiums are earned; or the contract may stipulate that, in case of default, the entire premium shall be considered as earned; or the note may be given in advance for premiums; or the liability may, by the character of the note

[209] Hart v. Pottawatamie Co. Mut. F. Ins. Co., 74 Iowa, 39; 36 N. W. Rep. 880.

[210] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Schoneman v. Western Horse & Cattle Ins. Co., 16 Neb. 404; Farmers' Mut. F. Ins. Co. v. Bowen, 40 Mich. 147.

[211] Bursteed v. West of England Ins. Co., 5 Irish Ch. 553.

[212] Pritchard v. Merchants' Assur. Soc., 3 Com. B., N. S., 622.

[213] Servoss v. Western Mut. Aid Soc., 67 Iowa, 86.

[214] Smith v. Continental Ins. Co., 6 Dak. 433; 43 N. W. Rep. 810.

itself, be absolute at all events;[215] and there are other cases in which the company will have a right to accept payments on the note without waiving forfeitures.[216] Thus, if the company, with full knowledge of the facts that a premium note is overdue and unpaid at the time of the loss of part of the insured property, accepts unconditionally the amount due on said note representing the entire premium, and there is no stipulation that the premium shall be considered as earned in case of default in payment at maturity of the note, it thereby waives its right to insist upon its exemption from liability, and the company is likewise estopped in such case to assert that its liability only revived as to that portion of the property which was not destroyed, and this even though the contract provides that the company shall not be liable for loss occurring during the time the policy is suspended by reason of nonpayment of the note at maturity.[217] In Smith v. Continental Insurance

[215] See c. xxxi, herein.

[216] See sec. 1365, and other sections under this chapter.

[217] Phœnix Ins. Co. v. Tomlinson, 125 Ind. 84; 9 L. R. Annot. 317; 31 Cent. L. J. 439; 19 Ins. L. J. 1004; 25 N. E. Rep. 126. See Phœnix Ins. Co. v. Lansing, 15 Neb. 494; 20 N. W. Rep. 22. The opinion of the court in the case in which this ruling was made is of sufficient importance to warrant the insertion of a part thereof; the court, per Elliott, J., said: "The only question which is here open to controversy is whether the company did waive the right to forfeit the policy by an acceptance of the premium after the loss had occurred. It is proper to say at the outset that this case is to be discriminated from such cases as Insurance Co. v. Henley, 60 Ind. 515, and Insurance Co. v. Leonard, 80 Ind. 272, for the reason that in those cases the premium notes were shown to be unpaid at the time of the loss, and it did not appear that the insurance company had subsequently accepted payment, while here there was an acceptance of the premium after the loss occurred. We cannot perceive any valid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment it affirmed the validity of the policy, and tacitly asserted that the policy was in force from the time it was executed. In such a case there is no interregnum in which there was a lifeless policy, for the policy is continuous in its nature and effect, and the premium covers the risk as an entirety. It would do violence to the intention of the parties and the language of their contract to declare, as the appellants seek to have us do, that the payment simply revived the policy. . . . . In our judgment, acceptance of the premium after the loss has occurred is a waiver of the right to declare a forfeiture of the policy, and not

Company[218] the policy had become void by reason of misrepresentations and effecting additional insurance. The note had

a mere act of revivor. . . . . To treat the acceptance of the premium as merely reviving the contract is, in effect, to adjudge a forfeiture. . . . . This is clear when it is brought to mind that, if the policy is held to be lifeless from the time of default in payment until after the loss, it must also be held that the insured cannot recover anything upon his contract. A construction of the conduct of the parties which will practically produce the same result as a declaration of forfeiture, is one which it is the duty of the courts to avoid, if it can reasonably be done. It is clear that this construction may be reasonably avoided. . . . . It is a familiar general rule that a party who accepts and retains benefit from a contract confirms the contract as it was executed. . . . . It is but just that the company having accepted the entire premium after the occurrence of the loss should yield the consideration for which the premium was paid. It is not just that the company should retain the premium and give no value in return. The fact that all of the property insured was not destroyed does not affect the question, for the policy is indivisible and continuous. . . . . It was not in the power of the assured to pay part only of the premium. He was bound to pay it all or lose the benefit of his contract. The rights of the parties are reciprocal. The company was not bound to accept part of the premium, nor had it a right to treat the premium as paid upon part only of the property insured. It was the right of the company to refuse to accept part of the premium, but it had no right to accept the whole premium, and treat it as payment for an insurance upon part only of the property covered by the policy. Having accepted the entire premium and full notice of the loss, it confirmed the contract as to the whole of the property insured. . . . . It cannot accept the entire premium and yet assert that it is liable only from the time of the acceptance, although the loss occurred prior to that time. . . . . The policy . . . . does not provide that the default in payment shall entitle the company to treat the premium as earned. If it did, we should have a more difficult question. In this instance, the premium was not earned, for the period covered by the policy was five years, and the loss occurred within seventeen months after the policy was written. There was, in fact, at the time of the loss and at the time of the acceptance of the amount of the judgment no earned premium beyond that paid in cash; nor is there any recital that default shall entitle the company to treat the premium as earned. There is, therefore, no tenable ground upon which the company can justify its act in taking the insurer's money, and yet repudiate liability for the loss. The moment the risk attached the premium paid was beyond recovery by the insured: Contra, Handley v. Insurance Co., 95 Ind. 254; Insurance Co. v. Houser, 111 Ind. 266; 12 N. E. Rep. 479. This right is correspondent with his burden. He cannot get his money back,

[218] 6 Dak. 433; 43 N. W. Rep. 810.

been paid in full, but after loss, and pending suit, the company accepted accrued interest on the note, and it was held that there was no waiver of the forfeiture on the ground that the premium was earned.[219] In another case the policy contained a like condition with that in Phoenix Insurance Company v. Tomlinson.[219a] A loss occurred while a note given for a portion of the cash premium remained unpaid and over-

but he can enforce his contract, and his contract is continuous for the period named and indivisible as to the property described. When the company accepted payment of the entire premium, it waived all right to forfeit the policy, for as the insured can get back no part of the premium paid, neither can the company escape the performance of its part of the contract. It cannot have the benefit and escape the burden. . . . . It was in the power of the company to accept or refuse payment. It made its election, and it must abide the legal consequences of that act. It was a voluntary performance with full knowledge of all the material facts, and the election was complete. We have studied with care the cases referred to by the appellant's counsel, and we cannot regard them as sustaining the position counsel assume; for we do not believe that in any of them is the doctrine asserted that under such a policy as that before us the insurance company may, with knowledge of the loss and notice that the assured is affirming the validity of the policy, accept and retain the entire premium, and yet refuse to pay the loss." The court then considers and reviews Klein v. Insurance Co., 104 U. S. 88; Wall v. Insurance Co., 36 N. Y. 157; Sweetser v. Association, 117 Ind. 97; Insurance Co. v. Gilman, 112 Ind. 7; 13 N. E. Rep. 118; Williams v. Insurance Co., 19 Mich. 451; Joliffe v. Insurance Co., 39 Wis. 111; Leyon v. Insurance Co., 55 Mich. 141; 20 N. W. Rep. 829; Bane v. Insurance Co., 85 Ky. 677; 4 S. W. Rep. 787; Titus v. Insurance Co., 81 N. Y. 410, and concludes: "The acceptance of the money was after the loss and after the company knew that the assured was affirming the validity of the policy and his right to recover the loss. It knew that he did not regard the policy as suspended, and by accepting the money it confirmed the contract as of the date of its execution."

[219] This case and others to substantially the same effect, viz.: Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354; 17 Ins. L. J. 703, and Cohen v. Continental Ins. Co., 67 Tex. 325; 3 S. W. Rep. 296, are considered in a note to 31 Cent. L. J. 442, appended to the case from which we have quoted the opinion in note 217 above. The writer, Mr. John A. Finch, concludes that: "It may be safely said that the weight of authority on a policy worded like this one is with the opinion," citing Schreiber v. German-American Hail Co., 43 Minn. 367; 45 N. W. Rep. 708; McMartin v. Continental Ins. Co., 41 Minn. 198; 43 N. W. Rep. 934; Phœnix Ins. Co. v. Lansing, 15 Neb. 494.

[219a] See note 217, under this section.

due, and it was held that the exemption of the company from liability was waived by its accepting after notice of loss the amount due on the note.[220] So where the insured died on the day the last of three notes given for the balance of a cash annual premium matured, and the note was taken up four days thereafter, the company was held liable for the loss.[221] In a Missouri case the forfeiture was also held to have been waived under the following circumstances: The policy provided that when a premium note was taken for a cash premium, any default in its payment should operate to suspend the company's liability until it should be paid. The assured gave such a note, and immediately after it was due, having another policy which he desired canceled and the unearned premium thereon applied to this note, and not knowing how much would be due the company, he proposed by letter to pay, asking for a statement of the amount, whereupon the company at once applied upon the note the amount in their hands, and directed him by letter to remit the balance, which he did by first mail, but a loss occurred before the remittance was mailed.[222] So there may be a waiver by the receipt by an agent of the amount of an overdue premium note, and the receipt by the company of the same from the agent without inquiry.[223] But in another case where a note was given for the premium and the insured property was lost by fire, after the maturity of the note and after the policy was forfeited by its terms for nonpayment of the note, it was held that the mere voluntary payment of the

[220] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; 20 Am. Rep. 35; distinguished from the case of Williams v. Albany City Ins. Co., 19 Mich. 251; Farmers' Ins. Co. v. Abbott, 40 Mich. 147.

[221] Froehlich v. Atlas L. Ins. Co., 47 Mo. 406. See Schoneman v. Western Ins. Co., 16 Neb. 404; 20 N. W. Rep. 284, where it was said by the court that "if there has been a failure to pay the premium promptly at the day, the company certainly may waive this condition, and if it afterward receives and retains it, and delivers the policy, there would seem to be no good reason why the company should not be bound by it. The consideration for the insurance is the premium, and if this is paid and appropriated by the company, the time of its payment would not seem to be material." But see Northwestern Ins. Co. v. Ammerman, 119 Ill. 329.

[222] Sims v. State Ins. Co., 47 Mo. 54; 4 Am. Rep. 311.

[223] Hodston v. Guardian L. Ins. Co., 97 Mass. 144.

note with legal interest after loss to a clerk of the insurer at its office, but against its express objection, did not operate as a waiver.[224] So it is decided in a case under substantially the same facts, with the exception that the payment was received without objection by the company, that such acceptance of the amount due on the note did not constitute a waiver,[225] nor is there any waiver of forfeiture where the amount of an overdue premium note is accepted after loss in ignorance thereof.[226] The insured has a right to accept the premium earned until the policy ceases to be in force, but if he accepts the full premium or compensation for the risk when the loss occurs, such act is declared not consistent with a claim that the policy is forfeited, or that the company is exempt from liability.[227] It is held in Iowa that an acceptance of a part of the amount of the note after maturity does not waive the forfeiture.[228] So occasional payments, after they become due, of notes given for premiums, and consequent renewals of the policy, are no waiver, as to premiums afterward due, of the stipulation for forfeiture on failure to pay a note when due.[229] And there is no waiver where the policy provides that the collection of the note, by suit or otherwise, shall not be construed to revive the policy.[230] So a waiver of a forfeiture cannot arise from the act of an attorney at law employed by the company to collect a premium note, where he expressly disclaims any authority except to collect the note.[231]

[224] Muhlman v. National Ins. Co., 6 W. Va. 508.

[225] Williams v. Albany City Ins. Co., 19 Mich. 451; distinguished in Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111, and in Phœnix Ins. Co. v. Tomlinson, 125 Ind. 84; 9 L. R. Annot. 317; 31 Cent. L. J. 439; 19 Ins. L. J. 1004; 25 N. E. Rep. 126, both noted above within this section.

[226] Harle v. Council Bluffs Ins. Co., 71 Iowa, 401; 32 N. W. Rep. 396.

[227] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; 20 Am. Rep. 35, per the court.

[228] Garlick v. Mississippi Valley Ins. Co., 44 Iowa, 553; Carlock v. Phœnix Ins. Co., 138 Ill. 210; 28 N. E. Rep. 53.

[229] Marston v. Massachusetts L. Ins. Co., 59 N. H. 92.

[230] Curtin v. Phœnix Ins. Co., 78 Cal. 619; 21 Pac. Rep. 370.

[231] Continental Ins. Co. v. Coons (Ky. Sup. Ct. 1892), 14 Ky. L. Rep. 110.

§ 1376. Waiver by Failure to Declare a Forfeiture. If the character and terms of the contract be such as to necessitate some formal declaration of forfeiture by the company, its omission to avail itself of the right to cancel a policy or declare a forfeiture for a failure to pay a premium note at maturity will be deemed a waiver of the right to insist on a forfeiture.[232] And a failure cannot be declared after a member's death so as to deprive the parties concerned of rights then existing. In such cases the liability of the insurer accrues on the death of the assured, and it is too late afterward to claim for the first time the benefit of a forfeiture.[233] It is also held that a condition in the policy that the note shall be void if not paid within a specified number of days after maturity, will be construed as meaning voidable only at the election of the company.[234] Under an open policy reciting payment of premium at a specified rate, but providing that the premium on each risk is to be fixed at the time of indorsement according to the rates of the company, when the character of the vessel and time of sailing are known, if the insured, on giving timely notice of a shipment, states all the facts, the circumstance that the vessel is out of time does not exonerate the insurers, but it is for them to object on that account and require the proportionate premium.[235] If by the terms of the policy or certificate the nonpayment of a premium or assessment at the day specified operates ipso facto to determine the contract, the delay of the company in declaring a forfeiture of a policy on its books for nonpayment of the premium is no waiver of the condition requiring prompt payment.[236]

[232] Western Horse & Cattle Ins. Co. v. Scheible, 18 Neb. 495; Montgomery v. Phœnix Mut. L. Ins. Co., 14 Bush (Ky.), 51. See Farmers' Mut. Relief Assn. v. Koontz, 4 Ind. App. 538; 30 N. E. Rep. 145, noted in text in section 1378; Phœnix Ins. Co. v. Coomes (Ky. 1891), 13 Ky. L. Rep. 238.

[233] Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200; Young v. Mutual L. Ins. Co. of New York, 2 Saw. (C. C.) 325.

[234] Louisville Underwriters v. Pence, 93 Ky. 96; 19 S. W. Rep. 10; 21 Ins. L. J. 493.

[235] Rolker v. Great Western Ins. Co., 4 Abb. App. Dec. (N. Y.) 76.

[236] Ashbrook v. Phœnix Mut. Ins. Co., 94 Mo. 72; 6 S. W. Rep. 463.

§ 1377. Failure to Insist Promptly on Payment of Premium Note.—Failure on the part of the insurer to insist on payment promptly at maturity of a premium note, does not operate as a waiver of the forfeiture arising under a stipulation in the policy and note that the latter shall lapse on default in payment, where it appears that one day before the note's maturity the insured notified the company that he would pay as soon as he could sell some property, and ten days thereafter the company wrote requesting assured to pay and revive the policy, and on the day of so writing the property was burned.[237]

§ 1378. Waiver—Collecting Loss—Adjustment and Allowance of Loss.—Although a mutual insurance company levies and collects an assessment to pay the loss under a policy, it does not thereby waive its right to avail itself of a forfeiture of the policy and its consequent exemption from liability for the loss.[238] But the adjustment and allowance of a loss may operate as a waiver of forfeiture for failure to pay assessments when due where the constitution of the society provides that insurance shall be perpetual, and that nonpayment should only suspend the protection till all dues shall be paid, and the company fails to declare the forfeiture.[239]

§ 1379. Waiver by Recognition of the Policy as in Force.—As a general rule if the company has treated the policy as valid, and has sought to enforce payment of the premium, or has otherwise with knowledge recognized, by its own acts or declarations, or those of its agents, the policy as still subsisting, it waives thereby prior forfeitures.[240]

[237] Dale v. Continental Ins. Co., 95 Tenn. 38; 31 S. W. Rep. 266.

[238] Nash v. Union Mut. Ins. Co., 43 Me. 343; 69 Am. Dec. 65; Mayer v. Equitable L. Assn., 42 Hun (N. Y.), 237. See, also, sec. 1289, herein, on appropriation of fund, etc.

[239] Farmers' Mut. Relief Assn. v. Koontz, 4 Ind. App. 538; 30 N. E. Rep. 145.

[240] Young v. Mutual L. Ins. Co. of New York, 2 Saw. (C. C.) 325; Robinson v. Pacific F. Ins. Co., 18 Hun (N. Y.), 395; Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200; Behler v. Insurance Co., 68 Ind. 347; Appleton v. Insurance Co., 59 N. H. 541. See secs. 1356,

§ 1380. Waiver by Giving Credit for the Premium.—The company may undoubtedly waive the condition as to payment on a specified day by accepting a note for the premium, or by otherwise giving credit therefor.[241] And where credit is intended to be given, and is unconditionally given, and the policy attaches, the waiver of a cash payment is irrevocable, and the company cannot thereafter insist upon a forfeiture, even though death ensues before actual payment, and in case of a finding of the court that there has been a waiver, the correctness or incorrectness of a series of requests which are founded on an assumption that payment had not been made is held not subject to review.[242]

§ 1381. Defense that Waiver Induced by False Representations.—If the company is induced by false representations or fraud of the assured to revive a forfeited policy, or to reinstate a suspended member, or to otherwise waive a forfeiture, the waiver so procured is void, and the facts constitute a defense to an action on the policy. Thus, false representations as to health inducing a waiver of forfeiture from failure to pay premiums when due may be shown, and being proven, will void the waiver and prevent a recovery.[243]

§ 1382. Waiver by Agents—Subordinate Lodges.—It is undoubted that an authorized agent or one acting within the apparent scope of his authority may, as well as the company, waive the condition requiring payment of premiums on specified days, even though the policy provides that no agent may waive forfeitures.[244] And an agent authorized to collect the

1361, on waiver and estoppel by acts, etc.; and also cases throughout this entire chapter.

[241] Thompson v. Knickerbocker L. Ins. Co., 104 U. S. 252.

[242] Miller v. Life Ins. Co., 12 Wall. (U. S.) 285.

[243] Harris v. Equitable L. Ins. Co., 64 N. Y. 196; 13 Alb. L. J. 248; 3 Hun (N. Y.), 724; 6 N. Y. S. C. 108.

[244] Marcus v. St. Louis M. L. Ins. Co., 68 N. Y. 625; Carson v. German Ins. Co., 62 Iowa, 433; Church v. Lafayette F. Ins. Co., 66 N. Y. 222; Sheldon v. Connecticut Mut. L. Ins. Co., 25 Conn. 207; Whitehead v. New York L. Ins. Co., 102 N. Y. 143; reversing 38 Hun (N. Y.), 425. If the premium has become due, and the assured, the day after having failed to pay the same, writes the company for a detailed

premiums may waive the payment in cash of the premium by applying the amount thereof in payment of a debt due from him to the assured, and if funds which the insured has a right to apply to the payment of premiums have thus come into the agent's hands, his retention of the same until after death of the assured will not prevent a recovery on the policy.[245] So an officer of the company, such as the president or secretary, may waive such condition as to punctual payment.[246] But the receipt of overdue assessments by an officer with qualified power does not waive the forfeiture and operate to reinstate a member, where it is stipulated that money received from a suspended member must be "tendered in open branch meeting," [247] and no waiver arises from the act of the secretary, in acknowledging payment of the premium, where he has no knowledge of the facts, and such acknowledgment is made under a mistake of facts.[248] But there is a waiver where the assured relies upon information from the agent as to the date of payment, and such information is incorrect.[249] And if the company declares a policy forfeited for nonpayment of premiums, and thereafter a tender is made by the insured to the vice-president and manager of the insurer, who refers him to the agent who issued the policy to arrange the matter, and the latter agrees to "fix it up" in accordance with a prior agreement to offset rents due against the premiums, the company is held by such acts not to have waived the claimed forfeiture, where the policy precludes agents from waiving forfeit-

statement of the condition of the policy, and also for figures for a paid-up policy, to which letter the president of the company replies furnishing the information asked, but does not state that the policy had lapsed, it will be deemed to have remained in force: Rowe v. Brooklyn L. Ins. Co. (1896), 38 N. Y. Supp. 621.

[245] Chickering v. Globe Ins. Co., 116 Mass. 321. That agent may waive cash payment by allowing credit, see Ball etc. Wagon Co. v. Aurora F. etc. Ins. Co., 20 Fed. Rep. 232.

[246] Dillebar v. Knickerbocker L. Ins. Co., 76 N. Y. 567.

[247] McGowan v. Supreme Coun. Cath. M. B. Assn., 56 Hun (N. Y.). 534; 58 N. Y. St. Rep. 268.

[248] Robertson v. Metropolitan L. Ins. Co., 88 N. Y. 541; reversing 47 N. Y. Super. Ct. 377 (two judges dissenting under the facts of the case).

[249] Selvage v. John Hancock Mut. L. Ins. Co., 12 Fed. Rep. 603; 11 Ins. L. J. 653.

ures;[250] and if the assured has notice of the agent's want of authority to receive overdue premiums, no waiver arises from the agent's unauthorized act in so doing, unless such act is ratified by the company.[251] Nor can an agent receive overdue premiums and give an antedated receipt therefor, so as to waive a forfeiture or revive the policy, nor is evidence admissible to show a usage so to receive and antedate premiums, or to authorize, by parol license, agents to do so.[252] So if premiums are required to be paid weekly, and the policy is to be void for arrears in payments of over four weeks, but a mode of revival is provided, a delay of fifteen weeks without any steps for revival is not excused by the fact that a branch superintendent of the company assures the insured that an arrearage does not matter, agents not having power, under the terms of the policy, to waive conditions or receive arrearages.[253] It is held in Illinois that the assured may be justified in believing that time for the payment of premiums is extended where he receives through the company's agent a circular issued by it setting forth its liberality in extending the time for said payment.[254] Unless officers of dependent or subordinate lodges are so authorized, they have no power to waive compliance with the laws of the higher order relating to payment of such assessments, either to give credit therefor or by receiving them when overdue,[255] although the extent of the authority of such agents is an unsettled question.[256] Where the secretary of a local lodge is not so authorized by the grand lodge, he does not by his habit of receiving past due assessments waive suspension for nonpayment of assessments.[257] But where the

[250] Sullivan v. Germania Ins. Co., 15 Mont. 522; 39 Pac. Rep. 742.

[251] McGowan v. Charter Oak L. Ins. Co., 16 Fed. Cas. 125; 4 Am. L. Rec. 559.

[252] Busby v. North American L. Ins. Co., 40 Md. 572.

[253] Mallory v. Metropolitan L. Ins. Co., 97 Mich. 416; 23 Ins. L. J. 63; 56 N. W. Rep. 773.

[254] United States L. Ins. Co. v. Ross, 159 Ill. 476; 42 N. E. Rep. 859.

[255] Borgraefe v. Supreme Lodge K. of H., 26 Mo. App. 218; 22 Mo. App. 127; Bouten v. American Mut. etc. Co., 25 Conn. 542; Miller v. Hillsborough F. Assn., 42 N. J. Eq. 458; Illinois Mas. B. Soc. v. Baldwin, 86 Ill. 479.

[256] See Manning v. Ancient O. U. W., 86 Ky. 136; 5 S. W. Rep. 385.

[257] Chadwick v. Order of Triple Alliance, 56 Mo. App. 463.

treasurer of a subordinate council forwarded to the supreme treasurer the sum total of assessments due from his council, and this included the amount due from him, it was held a sufficient payment, although not made through the collector, and that his widow was entitled to the benefit.[258] If the constitution of the endowment rank of the Knights of Pythias vests the entire charge and full control in a board of control, and said board treats the continued receipt up to a member's death, of assessments upon the policy or endowment as a waiver of the right to insist upon a forfeiture, there is a waiver of nonpayment of lodge dues, for which separate accounts are kept, and which forms no part of the consideration of the contract, it appearing that the member had not been suspended, but had been requested to pay before the next meeting, before which time he died.[259] If the supreme lodge receives assessments collected by the subordinate lodge, and retains them with a knowledge of a forfeiture, it waives the same.[260] So the subordinate order or local subdivision may advance for him the amount of a member's assessment.[261] If the president assumes that the lodge has acted upon an assessment, which is not the fact, and directs its payment, there can be no forfeiture for its nonpayment by a member.[262]

§ 1383. Waiver by Assured of Exemption from Assessment.—If the assured pays to the company after his policy is surendered the amount claimed by it prior thereto, and which he at the time believes himself liable to pay, such act does not constitute a waiver on his part, nor can an estoppel be based thereon as to exemption from his liability for subsequent losses.[263]

[258] Fairie v. Supreme Council, 47 Hun (N. Y.), 639; 15 N. Y. St. Rep. 155.

[259] Supreme L. K. of P. of the W. v. Kalinski. 15 Advance Sheets U. S. S. C. 1896, 1068.

[260] Illinois Mas. B. Soc. v. Baldwin, 86 Ill. 479.

[261] Scheu v. Grand Lodge etc. Ind. Forresters, 17 Fed. Rep. 214.

[262] Bagley v. Grand Lodge A. O. U. W., 46 Ill. App. 411.

[263] Tolford v. Church, 66 Mich. 431; 33 N. W. Rep. 913. "The court finds that this payment, together with what the defendant paid on the assessment of January 5th, more than paid all his liabilities to

§ 1384. Waiver by Assured of Defective Notice and Service of Same.—There is no question but that the assured may waive any objection which he is entitled to raise to a mere defect in the notice of an assessment. Thus, an application for reinstatement operates, as against the beneficiary, as a waiver of defects in the notice.[264] It is a reasonable assumption that the form and manner of service of a notice may be waived by the party entitled to the same, since whatever strictness is necessary in following specified or stipulated requirements, it is for the benefit and protection of the party entitled to notice, and all the circumstances should be considered in determining whether there has been such a waiver and whether the service is sufficient. If a party actually receives notice of an assessment through the mail, and does not object thereto, or to the manner of receiving the same, and is in no way injured by the departure from the stipulated mode, which requires either that he be personally called on or that notice in writing to pay the assessment be left at his last and usual place of abode or business, he will be deemed to have waived the mode of service.[265]

the company up to the time of the cancellation of his policy. We think this should have discharged the defendant from any further liability. Neither the officers of the company nor the receiver ever returned to the defendant his policy, or intimated to him that they did not regard the policy canceled, while the defendant relied upon the fact that it was no longer of any validity; and had the defendant's property named in the policy burned at any time after the 19th of March, 1884, I hardly think counsel for plaintiff would have been willing to admit liability to the payee named in the policy by the company," per the court.

[264] Hansen v. Supreme Lodge K. of H., 140 Ill. 301; 29 N. E. Rep. 1121. "In the application for a reinstatement no objection was made to the notice or any of the proceedings which led to the suspension, and in the absence of objection to the notice when Hansen had an opportunity to make an objection, if any existed, it will be presumed that all objection was waived," per the court.

[265] Hollister v. Quincy Ins. Co., 118 Mass. 478.

CHAPTER XXXV.

RETURN OF PREMIUMS AND ASSESSMENTS.

§ 1390. Principles governing right to return of premium where risk has not attached.
§ 1391. Stipulation for return of premium—Generally.
§ 1392. Stipulation: Statutes governing right to return of premium.
§ 1393. Return of proportionate premium: Surrender, rescission, cancellation, etc.
§ 1394. Stipulation may entitle to proportionate return of premium, although there be a partial or total loss.
§ 1395. Where underwriter discharged before performance of condition on which return of proportionate premium based.
§ 1396. Where condition satisfied but underwriter discharged from loss: Premium returnable although loss by excepted risk.
§ 1397. No return if risk has attached.
§ 1398. Premium returnable if policy ab initio void: Generally.
§ 1399. Insurance contract with infant: Return of premium.
§ 1400. Premium returnable where contract voidable or void for misrepresentations or fraud of assurer.
§ 1401. Premium returnable when paid by mistake of facts: Policy based upon mistake of law.
§ 1402. Whether premium returnable where foreign company has not complied with state laws.
§ 1403. Return of premium: Breach of warranty.
§ 1404. Premium returnable for misrepresentations or concealment of assured without fraud.
§ 1405. Premium not returnable: Policy illegal—Parties in pari delicto.
§ 1406. Premium not returnable: Policy void for fraud of assured or his agent.
§ 1407. Premium not returnable: Material alteration policy.
§ 1408. Return of premium: Breach of contract by assurer.
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§ 1420. Premium not returnable when risk entire.
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§ 1422. Return of premiums: Effect of usage: Review of authorities.
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§ 1425. Return of premium: Retention of a certain per centum by insurer.
§ 1426. Return of premium: Insurances by voluntary agent.
§ 1427. Recovery back of premium from agent.
§ 1428. Who may recover back premium.
§ 1429. Return of premium: Assignment: Right of assignee.
§ 1430. Return of premium: Miscellaneous authorities.

§ 1390. Principles Governing Right to Return of Premiums where Risk has not Attached.—Insurance is a contract. Its very definition imports the payment of a consideration or price on the part of the assured, and the assumption of a risk or peril by the assurer. The premium or cost of insurance is fixed or adjusted with reference to the risk or peril assumed. Premium and risk are both of the very essence of the contract, and each is dependent upon and inseparable from the other. The very life of the contract involves the presumption of a risk, and the assurer is paid the premium or price of insurance to take upon himself the peril or event insured against. It therefore necessarily follows that if the risk has not attached, or if no part of the interest insured is exposed to any of the perils insured against, the insurer has no claim to the premium; if paid, it must be returned.[1] In this con-

[1] 2 Arnould on Marine Insurance, ed. 1850, 1225, *1210; Ætna L. Ins. Co. v. Paul, 10 Bradw. (Ill.) 431; Blaeser v. Milwaukee Mut. Ins. Co., 37 Wis. 31; 19 Am. Rep. 747; Dawkes v. Covencigh, Styles, 346; 1 Hale's P. C. 546; Flint v. Fleming, 1 Barn. & Adol. 45; Elbers v. United Ins. Co., 16 Johns. (N. Y.) 129; Insurance Co. v. Ryle, 44 Ohio St. 19; Hale's P. C. 546; Flint v. Fleming, 1 Barn. & Adol. 45; Elberts x. United States Ins. Co., 11 Pick. (Mass.) 85; Davidson v. Case, 8 Price. 542; Wells v. Abraham, L. R. 7 Q. B. 554; Penniman v. Tucker, 11 Mass. 66; Mason v. Sansbury, 3 Doug. 61; 1 Duer on Marine Insurance, ed. 1845, 200, 201, and cases under notes following in this section. If the risk has never attached under a fire policy, there must, in the absence of fraud by the insured, be a return of premium: Jones v. Insurance Co., 90 Tenn. 604; 25 Am. St. Rep. 706.

nection the rule as stated by Lord Mansfield, in a case decided in the court of King's Bench in 1777, has been[2] extensively quoted and relied on by the courts and English and American law-writers. That eminent jurist says that if the risk has not been run, whether owing "to the fault, will, or pleasure of the assured, or to any other cause, the premium shall be returned," and his reasons are substantially those above given. So, also, in another case he uses substantially the same words, and says: "If the risk be not run, though it be by the neglect, or even the fault, of the insured, yet the insurer shall not retain the premium."[3] So Emerigon, quoting from Pothier, says: "As the premium is the price of the risks that the insurers are to run, and as there can be no price of risks when the insurers have not run any, this obligation to pay the premium naturally includes the tacit condition, if the insurers run the risk"; and that if the assurers have not run any risk, "although by the act of the insured, the premium shall not be due to the insurers, ... and if it had already been paid them, they will be bound to return it; . . . . so if merchants have effected insurance on goods, which they propose to load on board a certain ship, but, having changed their minds, the shipment is not made, the premium of insurance on these goods shall not be due to the insurers, who have not in this case run any risk."[4] If the voyage insured never commences, or it be entirely broken up before the departure of the vessel, so that the ship never sails on such voyage, even by the act or fault of the insured, or if the voyage becomes void by a failure of the warranty, there being no actual fraud, the insured is entitled to a return of the premium, for the risk must attach to warrant the retention of the price paid. This rule is undisputed.[5] So where a vessel sails on a voyage differ-

[2] Tyrie v. Fletcher, Cowp. 666.

[3] Stevenson v. Snow, 3 Burr. 1237.

[4] Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 1, p. 656. See, also, this reference for review of law as stated by the early foreign authors. See, also, 2 Marshall on Insurance, ed. 1810, c. xv, sec. 2, p. 652, et seq.; Bermon v. Woodbridge, Doug. 751, per Lord Mansfield; Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield.

[5] Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 1, pp. 51, 52; c. xvi, sec. 1, pp. 650, 652-54; Richards v. Marine Ins. Co., 3

ent from the one insured, the insured is entitled to a return of the premium;[6] and the premium is to be returned which is paid for insurance against a blockade erroneously supposed to exist.[7] So also if the goods are not shipped,[8] or if the risk never attached on the goods, the insurance being on ship and cargo, the cargo not being loaded.[9] So also if the policy be void ab initio through fault of the insured, without fraud, or if there be a want of insurable interest;[10] and in general this principle of an attachment of the risk governs the right to a return of the premium in all cases subject to such exceptions as are noticed under the subsequent sections of this chapter.

§ 1391. Stipulation for Return of Premium—Generally. It is competent for the parties to stipulate that under certain conditions or the happening of some event, or the not happening of a specified contingency, a part of the premium shall be returned. Such stipulations may lawfully be, and should be, inserted in the policy, or otherwise made a part of the contract, and when so made are enforceable. Such agreements may be required by statute, as where a standard form of fire policy is provided, or the stipulation may exist by virtue of some code provision, with reference to which the contract is assumed to have been made, and which may thereby become a

Johns. (N. Y.) 307; Graves v. Marine Ins. Co., 2 Caines (N. Y.), 339; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Bermon v. Woodbridge, Doug. 781; Delairgue v. United Ins. Co., 1 Johns. Cas. (N. Y.) 310; Russell v. De Grand, 15 Mass. 35; Jackson v. New York Ins. Co., 2 Johns. Cas. (N. Y.) 191; Boehm v. Bell, 8 Term Rep. 154; Murray v. Columbian Ins. Co., 4 Johns. (N. Y.) 307; Martin v. Sitwell, 1 Shaw, 156; Horneyer v. Lushington, 15 East, 46; 3 Camp. 85; Duguet v. Rhinelander, 1 Johns. Cas. (N. Y.) 360; Commonwealth Ins. Co. v. Whitney, 1 Met. (Mass.) 21, 23; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241; Penson v. Lea, 2 Bos. & P. 330; Robertson v. United Ins. Co., 2 Johns. (N. Y.) 250; Penniman v. Tucker, 11 Mass. 66; Murray v. United Ins. Co., 2 Johns. (N. Y.) 168; Audley v. Duff, 2 Bos. & P. 111; Siffkin v. Alnutt, 1 M. & S. 39; Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch (C. C.), 357; Waddington v. United States Ins. Co., 17 Johns. (N. Y.) 23.

[6] Forbes v. Church, 3 Johns. Cas. (N. Y.) 159.

[7] Taylor v. Sumner, 4 Mass. 56.

[8] Martin v. Sitwell, 1 Shaw, 156; Tappan v. Atkinson, 2 Mass, 365.

[9] Horneyer v. Lushington, 15 East, 46.

[10] See secs. 1398, 1400, 1405, 1410, herein.

part thereof.[11] So in accident policies it may be stipulated that no claim shall be valid in excess of a specified sum in case of death, or in excess of a certain sum payable periodically in case of injury, nor for indemnity in excess of the money value of the insured's time, and that all premiums paid for such excess shall be returned on demand to the insured or his legal representative.[12]

§ 1392. Stipulations—Statutes Governing the Right to a Return of the Premium.—In some of the states statutes have been passed providing for a return of unearned premiums, in cases of fire risks, for the excess of insurance over the loss.[13] But several states have adopted laws providing that in fire policies the amount fixed in the policy shall be taken conclusively to be the true value of the property when insured and the true amount of loss; while in California the code provides at length as to when premiums are returnable and when not.[14] There are also provisions relating to the return of the unearned premium where the assured rescinds or the assurer cancels the policy.[15]

§ 1393. Return of Proportionate Premium—Surrender, Rescission, Cancellation, etc.—It is a general rule that if the risk has once attached, the insured cannot thereafter entitle himself to a return of the premium, by giving notice of his intention to terminate the contract, nor can he do so by rejecting the policy where the risk has commenced; for he cannot by his own act release himself from his obligations, and compel the underwriter to relinquish his contract and return the premium which has been earned.[16] But if the code, in

[11] 1 Marshall on Insurance, ed. 1810, 669 a, *670; 2 Arnould on Marine Insurance, ed. 1850, 1246, sec. 426. See sections next following.

[12] Taken from form of accident policy.

[13] Idaho Rep. 1881-87, sec. 2759; La. Acts, 1888, No. 149; Nev. Gen. Stats. 1885, sec. 993; Or. 2 Hill's Annot. Stats. 1887, sec. 3585; Wash. 1 Hill's Stats. 1891, sec. 2740.

[14] Deering's Annot. Civ. Code Cal., secs. 2617-22.

[15] See sec. 1634, herein.

[16] New York M. & F. Ins. Co. v. Roberts, 4 Duer (N. Y.), 141; Leonard v. Washburn, 100 Mass. 251; Langhorn v. Cologan, 4 Taunt. 330, per Lord Mansfield. "When the contract is yet imperfect and in-

relation to which a contract is assumed to have been made, provides that if insurance is made for a definite period of time the insured shall be entitled, upon a surrender of his policy, to such proportion of the premium as corresponds with the unexpired term, after deducting from the whole premium any claim for loss or damage which has previously accrued under the policy,[17] and the grounds of cancellation are set forth in other sections of the code, the assured is not entitled to cancel the policy without cause, and to insist upon such proportionate return of the premium, unless there is a right of cancellation reserved in the policy itself.[18] In the standard fire policy in New York it is stipulated that if the policy is canceled as provided therein, or shall become void or cease, and the premium has been actually paid, the unearned premium shall be returned on surrender of the policy or last renewal, the company retaining the customary short rate, except that where the policy is canceled by the company by giving notice, it shall retain only the pro rata premium. It is also provided that the policy may be canceled at anytime at the request of the insured or by the company, by giving notice as provided therein.[19] If the policy provides for cancellation by either party and a return of the unearned premium pro rata, the payment of the earned premium cannot be avoided by the assured on the ground that the policy is void, but he must offer to surrender the policy or demand a return of the premium;[20] and a party

choate, the assured by preventing the inception of the risk . . . . may prevent it from becoming operative, and in effect dissolve it, but in no other case can he release himself by his own act from his own obligations" so as to entitle him to a return premium: 1 Duer on Marine Insurance, ed. 1845, 82, 143.

[17] Deering's Annot. Civ. Code Cal. sec. 2617.

[18] Joshua Hendy Machine Works v. American Steam Boiler Ins. Co., 86 Cal. 248; 24 Pac. Rep. 1018.

[19] 3 N. Y. Rev. Stats., 8th ed., p. 1663; Laws 1886, c. 488. See, also, Mass. Acts, 1887, c. 214, sec. 60; Michigan Pub. Stats. 1882, secs. 4344, 4353; Amended Pub. Acts, 1889, c. 39, sec. 9; 1 Minn. Stats. 1891, secs. 2973, 2977; Gen. Laws, 1889, c. 217; N. H. Laws, 1885, c. 93, sec. 3; N. J. Laws, 1892, c. 231; N. Dak. Laws, 1890, p. 253, c. 74; Pa. Laws, 1891, p. 22, sec. 1. See Laws, 1892; 1 Wis. Laws, 1891, c. 195.

[20] St. Paul F. & M. Ins. Co. v. Neidecken, 6 Dak. 494; 43 N. W. Rep. 696.

seeking a rescission is liable for any part of the premium which may have matured previous to such rescission.[21] An agreement for a return of a fair proportion of the premium, in case the policy holder wishes to cancel the contract, is not void for uncertainty,[22] and the return premium must be paid or tendered by the company, otherwise there is no cancellation, and the policy continues in force until such tender or payment is made, and this although the company has notified the insured or has announced its readiness to pay,[23] even though the company notifies the assured's agent that it is ready to pay it, but does not do so in fact until after the loss; [24] although it is held in Illinois that notice alone is sufficient, although the stipulation is to return to the assured the unearned premium, where it is also stipulated that the cancellation may be made "at any time by either party." [25] And if the unearned premium is paid and accepted by the assured after the loss, both parties being ignorant thereof, the company is not thereby released from its liability.[26] If the assured accept in full satisfaction less than a ratable return of his premium upon cancellation, it is sufficient.[27] And actual tender of the unearned premium is held unnecessary in Wisconsin, provided the minds of the parties have met on the point that the policy is to be canceled.[28] So the insured is estopped if he voluntarily, at the agent's request, surrenders the policy without exacting payment as a condition precedent.[29]

[21] American Ins. Co. v. Garrett, 71 Iowa, 243; 32 N. W. Rep. 356.

[22] Hayward v. Knickerbocker L. Ins. Co., 12 Daly (N. Y.) 42.

[23] Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465; Hollingsworth v. Germania Ins. Co., 45 Ga. 294; Home Ins. Co. v. Curtis, 32 Wis. 402; Hathosan v. Germania Ins. Co., 55 Barb. (N. Y.) 28; Manlove v. Commercial Mut. F. Ins. Co., 47 Kan. 309; 27 Pac. Rep. 979; 21 Ins. L. J. 174; Peoria etc. Ins. Co. v. Botto, 47 Ill. 516.

[24] Hollingsworth v. Germania Ins. Co., 45 Ga. 294; 12 Am. Rep. 579.

[25] Newark F. Ins. Co. v. Sammons, 11 Ill. App. 230.

[26] Hollingsworth v. Germania Ins. Co., 45 Ga. 294; 12 Am. Rep. 579.

[27] Ætna Ins. Co. v. Weissinger, 91 Ind. 297.

[28] Bingham v. North American Ins. Co., 74 Wis. 498; 43 N. W. Rep. 494.

[29] Bingham v. North American Ins. Co., 74 Wis. 498; 43 N. W. Rep. 494. See Hopkins v. Phœnix Ins. Co., 78 Iowa, 344; 43 N. W. Rep. 197.

§ 1394. Stipulation may Entitle to Proportionate Return of Premium, although there be a Partial or Total Loss of Goods, etc.—If there be a stipulation for the return of a proportionate part of the premium if the ship "sails with convoy and arrives," the condition is so far performed that there shall be a return of the premium agreed upon: 1. If the ship sails with convoy, and actually arrives at the ultimate port of destination although she does not arrive with convoy; 2. If having departed with convoy the ship herself arrives, although the policies be upon other interests, such as goods or freight, and there be a partial loss of the goods, as the subject of indemnity, and the safe arrival of the goods constitutes in such case no part of the question as to return of premium; 3. If the ship arrives, and before she has completed unloading her cargo is captured, and the residue of the goods are thereby totally lost; 4. If the ship departs with convoy, intending to join convoy for the whole trade at a port at which she is at liberty to touch and stay, and the convoy with which she sails becoming lost the ship runs for and arrives at the port of destination; 5. If the ship arrives, having sailed with convoy, though being captured and recaptured, the underwriters are obliged to pay the salvage. But it will not avail the assured that the arrival was prevented by an act under which the underwriters would be discharged, and if the ship is to sail with convoy from one port to another, and from convoy to that port to the port of destination, it being stipulated to return different portions of the premium for each stage of the voyage, the word "arrives" must refer to the ultimate port of destination, and the ship must actually arrive.[30]

[30] Simonds v. Boydell, 1 Doug. 255, per Lord Mansfield (policy on goods); Horncastle v. Haworth, per Sir J. Mansfield, C. J., in 1806, reported in 1 Marshall on Insurance, ed. 1810, *674; Audley v. Duff, 2 Bos. & P. 111, per Lord Eldon; Everard v. Hollingsworth, 2 Bos. &. P. 111, note; Aguilar v. Rodgers, 7 Term Rep. 421, per Lord Kenyon and Grose and Lawrence, Justices (policy on freight); Kellner v. Le Mesurier, 4 East, 396, per Lord Ellenborough; 2 Arnould on Marine Insurance, ed. 1850, 1246, *1232, et seq.; 2 Marshall on Insurance, ed. 1810, 669 a. *670, et seq. See 1 Parsons on Marine Insurance, ed. 1868, 514; 2 Phillips on Insurance, 3d ed., 522, sec. 1840. But see on last point, Levin v. Cormac, 4 Taunt. 482, note; Ogden v. Firemen's Ins. Co., 12 Johns. (N. Y.) 114. Of the above cited cases

And where the ship was warranted to depart with convoy from England, on a voyage from Hull to Bilboa, and she sailed from Hull to Portsmouth, and from there with convoy, which was not the direct course, and was captured, the premium was apportioned, return being made except as to that part of the voyage from Hull to Portsmouth, for which the premium was retained.[31]

§ 1395. Where Underwriter Discharged before Performance of Condition on which Return of Proportionate Premium Based.—If the underwriter be discharged before the condition can be complied with, on performance of which the additional premium paid is stipulated to be returned, as in case the underwriter is discharged by a breach of warranty as to the time of sailing before the ship can sail with convoy, it being stipulated for a proportionate return of premium if the ship sails with convoy and arrives, there shall be a return of the premium stipulated as to convoy.[32]

in that of Simonds v. Boydell the full value stipulated was allowed on the whole amount of insurance, in addition to an average loss paid by the underwriters. In Horncastle v. Haworth the stipulated return of premium was recovered, in addition to a total loss. And Lord Mansfield declared in the Simonds v. Boydell case that if it had been meant that no return should be made unless all the goods arrive safe, it would have been stipulated that the ship "arrive with all the goods" or "safely with the goods." And in the Kellner v. Le Mesurier case it was declared that the words "and arrives" annex a condition which overrides and governs all the several stipulations for a return of the premium, and meant a sailing with convoy for the different parts of the voyage as stipulated, and that the aggregate of the different portions of the premium should then be returnable if the ship arrived at the ultimate port of destination, for whatever benefit would be derived from sailing with convoy would not be derived to the underwriters in case of partial convoy only. The rule above stated, however, does not apply where the stipulation is merely to sail with convoy; the fact that she has so sailed does not warrant a recovery of the stipulated proportionate premium in addition to a total loss, though in this case the whole amount of the premium was added to the invoice and included in the total loss: Langhorn v. Alnutt, 4 Taunt. 510, before Sir J. Mansfield; 2 Arnould on Marine Insurance, ed. 1850, 1250.

[31] Rothwell v. Cooke, 1 Bos. & P. 172.

[32] Meyer v. Gregson, 3 Doug. 402, reported in 1 Marshall on Insurance, ed. 1810, 658, 676, per Lord Mansfield, and Justices Ashurst and Buller.

§ 1396. Where Condition Satisfied but Underwriters Discharged from Loss—Premium Returnable although Loss by Excepted Risk.—If the condition is satisfied on the performance of which a proportionate return of the premium is stipulated to be made, as in case of a condition for such return "for return," and both ship and goods arrive safely, the insured is entitled to the agreed upon proportionate return of premium, although after the arrival the goods are seized in the ship's port of discharge before they can be unloaded, and although the loss is by an excepted risk, or one not insured against. In this case the risk on the goods was to continue until they were discharged and safely landed, with a warranty to free from capture or seizure in the ship's port of discharge, and the underwriters were discharged from the loss.[33] Mr. Phillips, relying upon this and other cases, says they "favor the equitable construction that the condition of arrival or other event on which the return is to depend is satisfied by the underwriters being exonerated." [34]

§ 1397. No Return if Risk has Attached.—If a legal risk has once attached or commenced, there shall be no apportionment or return afterward of the premium, so far as that particular risk is concerned. Diminution in its duration has no effect to decrease the amount stipulated as the premium or price for renewing the risk, for it is sufficient to preclude a return that the insurer has been liable for any period, however short. This rule is based upon just and equitable principles, for the assurer has, by taking upon himself the peril, become entitled to the premium, and although the rule may

[33] Dalgleish v. Brooke, 15 East, 295. Mr. Arnould says: "It is no objection to the claim for a return of premium that the loss was not one insured against provided the ship have arrived": 2 Arnould on Marine Insurance, ed. 1850, 1250, *1236, relying on this case.

[34] 2 Phillips on Insurance, 3d ed., 523, sec. 1841; citing Kellner v. Le Mesurier, 4 East, 396; Dalgleish v. Brooke, 15 East, 295; Ogden v. Firemen's Ins. Co., 12 Johns. (N. Y.) 114. In this last case the condition was not literally fulfilled, but the court by construction held that the risk was divisible, and that the event contemplated was that the underwriters should run no risk between certain ports, which having happened, the premium should be returned.

result in profit to the insurer, it is but a just compensation for the dangers or perils assumed; besides the danger incurred may be greater in one moment than during an entire voyage, and it would be extremely difficult, at the least, to fairly apportion the premium.[35] So it is held in Maine that the liability of an insurance company for a return of premiums is not absolute, but depends upon whether the policy has become a binding contract between the parties. If it has, and the risk has commenced, there can be no apportionment, and no action lies for the recovery of premiums paid.[36] If one insures the profits of a ship and the ship returns in ballast, the insured is not entitled to a return of the premium.[37] And the same rule applies where a return of premium is sought on the ground of a want of interest, the risk having been run and the ship arrived.[38] Where the policy on goods was of date December 21st, with warranty to sail between October 20th and December 1st, and the cargo was all in before the last date, although the ship had not then sailed, but did so between December 2d and 21st, it was held that the risk attached in port, and the premium was not returnable.[39] There may be such an attachment of the risk that, although the policy be not

[35] Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 2, pp. 654, 655; c. iii, sec. 1, p. 52; Tyrie v. Fletcher, 2 Cowp. 666, per Lord Mansfield, C. J.; Furtado v. Rogers, 3 Bos. & P. 191; New York M. & F. Ins. Co. v. Roberts, 4 Duer (N. Y.), 141; Moses v. Pratt, 4 Camp. 297; Waters v. Allen, 5 Hill (N. Y.), 421; Insurance Co. v. Pyle, 44 Ohio St. 19; 58 Am. Rep. 781; Fulton v. Lancaster Ins. Co., 7 Ohio, 325; Hoyt v. Gilman, 8 Mass. 336; Steinback v. Col. Ins. Co., 2 Caines (N. Y.), 132; Continental L. Ins. Co. v. Houser, 111 Ind. 266; Clark v. Manufacturers' Ins. Co., 2 Wood. & M. (U. S.) 472; Joshua Hendy Works v. Insurance Co., 86 Cal. 248; 21 Am. St. Rep. 33; Hendricks v. Connecticut Ins. Co., 8 Johns. (N. Y.) 1; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Gray v. National B. Assn., 111 Ind. 531; Blaeser v. Milwaukee Mut. Ins. Co., 37 Wis. 31; 19 Am. Rep. 747; Taylor v. Lowell, 3 Mass. 331; Standley v. Northwestern Mut. L. Ins. Co., 95 Ind. 254, 258; Bermon v. Woodbridge, Doug. 789, per Lord Mansfield; Matt v. Roman Catholic Mut. etc. Soc., 70 Iowa, 455; 30 N. W. Rep. 799; Cal. Civ. Code, secs. 2616, 2618.

[36] Malhoit v. Metropolitan L. Ins. Co., 87 Me. 374; 47 Am. St. Rep. 336.

[37] Juhel v. Church, 2 Johns. Cas. (N. Y.) 333.

[38] Boehm v. Bell, 8 Term Rep. 154.

[39] Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1.

made when the risk has terminated, a loss would have been covered during the continuance of the risk. In such case there can be no return of the premium.[40]

§ 1398. Premium Returnable where Policy Ab Initio Void—Generally.—The policy may be void ab initio, and the risk never have attached, there being no fault of the insured, as in case of breach of warranty whereby no liability is ever incurred by the assurer; or there may be an entire want of interest; or the policy may be void for illegality, the parties not being in pari delicto; or it may be void ab initio by some act or omission of the assurer; in all of which cases the premium is returnable.[41] Cases of this character are, however, to be distinguished from those where the policy is void, the parties being in pari delicto, and those where it is void through the fraud of the assured or his agent, and cases where the policy having once attached, it has become subsequently void by an act or omission of the assured, whereby the policy has become forfeited.[42] A note given for the premium is not recoverable where the policy is one which the company has no authority under its charter to issue, the act being ultra vires, as in case where a corporation, formed to insure against fire and marine risks, issues a policy insuring the lives of animals.[43] So also where the interest is of a character that should be described and is not.[44] So the premium note may be void because the policy was never countersigned, it being issued by one without authority therefor.[45] And though the policy be

[40] 2 Phillips on Insurance, 3d ed., 505, sec. 1826; citing Park on Insurance, 563. Mr. Phillips says: "Policies not unfrequently admit of this construction."

[41] Anderson v. Thornton, 8 Ex. 425; Mount v. Waite, 7 Johns. (N. Y.) 334; Friesmuth v. Agawam M. Ins. Co., 10 Cush. (Mass.) 587; Heutig v. Stainforth, 5 M. & S. 122; Waller v. Northern Assur. Co., 64 Iowa, 101; Ætna L. Ins. Co. v. Paul, 10 Bradw. (Ill.) 431. See sections next following.

[42] See sections following.

[43] Rochester Ins. Co. v. Martin, 13 Minn. 59. And see sec. 334, herein.

[44] Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250.

[45] Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400. See chapter on premium notes. The premium is returnable "when by any default of the in-

illegal, yet if the parties be ignorant thereof, the premium is returnable.[46]

§ 1399. Insurance Contract with Infant—Return of Premium.—If a solvent insurer enters into a contract which it may fairly and reasonably make, with an infant for a sum fairly commensurate with his estate and ability to pay, and at the ordinary and usual rates, there being no fraud or unlawful practices in procuring the risk, the infant may not rescind and recover back the premiums, but the insurer is entitled to those intended to cover the current annual risks under the policy.[47]

§ 1400. Premium Returnable where Contract Voidable or Void for Misrepresentations or Fraud of Assurer. That the insured is entitled to a return of the premium when the contract is voidable for the misrepresentation or fraud of the assurer, is well settled.[48] So an insured person induced by false representations material to him to take out a policy upon his life may elect to rescind and avoid the policy, and is then entitled to recover the premiums paid, but if such false representations are not material to him, and are a fraud upon the insurer alone, he is not entitled to recover.[49] And the rule applies where the company is chargeable with its agent's knowledge of the invalidity of the policies, and receives premiums thereafter, said invalidity having been occasioned by the statements of said agent; as in case of a policy taken out by plaintiff on the lives of her brother and sister, payable to herself, she having signed their names to the application with

sured other than actual fraud the insurer never incurred any liability under the policy": Cal. Civ. Code, sec. 2619.

[46] Henry v. Stainforth, 4 Camp. 270; Orme v. Bruce, 12 East, 225.

[47] Johnson v. Northwestern Mut. L. Ins. Co., 56 Minn. 365; 39 Cent. L. J. 337; 59 N. W. Rep. 992.

[48] Carter v. Boehm, 3 Burr. 1909, per Lord Mansfield; United States L. Ins. Co. v. Wright (Ohio), 8 Ins. L. J. 169; Court v. Martineux, 3 Doug. 161; Duffel v. Wilson, 1 Camp. 401; Boland v. Whitman, 33 Ind. 64; Lefevre v. Boyle, 3 Barn. & Adol. 877; Martin v. Ætna L. Ins. Co. (Tenn.), 4 Ins. L. J. 899; Cal. Civ. Code, sec. 2619.

[49] Malhoit v. Metropolitan L. Ins. Co., 87 Me. 374; 47 Am. St. Rep. 336.

the knowledge of the company's agent who had solicited the insurance, and had assured her of her competency to sign their names, and the premiums having been paid thereon for several years before she ascertained that the policies were void, it was held that the premiums should be recovered back.[50] And where the assured was not examined by a physician as required, and the beneficiary had paid premiums under an assurance from the company's agent that he should have his money or the policy, they may be recovered back.[51] But if the alleged false representations relate to the company's solvency, there can be no recovery back of the premiums paid on proof of insolvency long after the payment of the premiums sought to be recovered.[52] And if the statement relied on of the insurer is only a belief or expectation on his part, without fraud, there shall be no return.[53] This rule is further illustrated by the oft-cited instance where the underwriter effects an insurance "lost or not lost," the safe arrival of the ship being already known to him.[54] In a New York case the defendant advertised and represented that its patrons could be insured at half the expense of insuring in other companies by paying half the premiums in cash and giving notes for the other half, the dividends always paying the notes. The dividend never paid the notes, but generally fell far short, as the managers knew. The plaintiff procured an endowment policy for five hundred dollars, payable in five years, paying half cash and giving notes for the other half. Only one small dividend was made during the term. At the end of the five years the plaintiff demanded the five hundred dollars, but the defendant refused to pay more than the difference after deducting the amount due on the notes. It was held that an action for fraud was maintainable, that the plaintiff was not estopped by the delay, and that the measure of recovery would be the

[50] Fulton v. Metropolitan L. Ins. Co. (N. Y. 1892). 19 N. Y. Supp. 660.

[51] Frain v. Life Ins. Co., 67 Mich. 527.

[52] Life Assn. of America v. Goode, 71 Tex. 90; 8 S. W. Rep. 639.

[53] Pauson v. Watson, Cowp. 787.

[54] Carter v. Boelin. 3 Burr. 1909, per Lord Mansfield. See, also, Emerigon on Insurance, Meredith's ed. 1850, c. xvi, p. 663.

money paid and interest.[55] It is held in a Maine case that a life policy, regular in every respect except that through the fraud of the agent there has been no medical examination of insured, and the application has not been signed by him, although it purports to have been, and the whole transaction has taken place without his knowledge or consent, is voidable at the election of insurer, but not absolutely void, and the insured cannot recover premiums paid thereon if the insurer has treated the policy as a valid subsisting contract.[56]

§ 1401. Premium Returnable when Paid by Mistake of Facts—Policy Based upon Mistake—Mistake of Law. As a general rule, if the premium is paid through mistake as to the facts, under the supposition, which is unfounded, that there is an obligation to pay, it is returnable; or, in other words, if a premium is paid under a supposition that a certain state of facts exists whereby the company would be entitled to

[55] Rohrschneider v. Knickerbocker L. Ins. Co., 76 N. Y. 216; 32 Am. Rep. 290.

[56] Malhoit v. Metropolitan L. Ins. Co., 87 Me. 374; 47 Am. St. Rep. 336. The court, per Foster, J., says: "In Massachusetts, the court in recent decisions has held the policy voidable: Leonard v. Washburn, 100 Mass. 251; Plympton v. Dunn, 148 Mass. 523. The supreme court of the United States holds such acts to be the acts of the company, and bind it; Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222; Insurance Co. v. Mahone, 21 Wall. (U. S.) 152; New Jersey etc. Ins. Co. v. Baker, 94 U. S. 610. In New York the policy is held to be binding upon the company: Baker v. Home Life Ins. Co., 64 N. Y. 648; Miller v. Phœnix etc. L. Ins. Co., 107 N. Y. 292; O'Brien v. Home Ben. Soc., 117 N. Y. 310. In Connecticut, the policy is held to be voidable: Ryan v. World Mut. Ins. Co., 41 Conn. 168; 19 Am. Rep. 490. In Ohio, the policy is held to be valid: Massachusetts L. Ins. Co. v. Eshelman, 30 Ohio St. 647. In Iowa, the policy is held valid: McArthur v. Home Life Assn., 73 Iowa, 336; 5 Am. St. Rep. 684. In this case the agent inserted without the knowledge of the assured false answers in the application, and forged the certificate of medical examination. In Michigan, the policy is held to be valid and binding upon the company: Brown v. Metroolitan L. Ins. Co., 65 Mich. 306; 8 Am. St. Rep. 894; Temmink v. Metropolitan L. Ins. Co., 72 Mich. 388. So in Colorado State Ins. Co. v. Taylor, 14 Colo. 499; 20 Am. St. Rep. 281. While in different jurisdictions there is a contrariety of opinion as to the effect of the acts of agents which are a fraud upon the company, they are held either to have estopped the company from taking advantage of them, or to have rendered the policy voidable only."

the money, and the supposed facts do not exist, and the premium would presumably not have been paid had the actual facts been shown by the payer, such premium so paid may be recovered back.[57] Thus, if a premium be paid after a forfeiture of the policy under a mistake as to the fact of waiver, it shall be returnable.[58] So also in case of an assessment collected by mistake after a forfeiture.[59] So where a policy is issued under an honest supposition of the parties that a state of facts exists which does not,[60] as in case of a blockade erroneously supposed to exist, there shall be a return of the premium.[61] And where contributions are made by members of a benefit order to a relief fund, under the belief that they were compulsory, they may be recovered back after a decision by the court that such contributions are not compulsory.[62] So if an assessment is levied and collected by a receiver, which under the facts there is no absolute legal duty on the part of the members to pay, it shall be repaid.[63] So also where the illegality of the voyage rests on facts of which the parties are in ignorance, without their fault, or where both parties contemplated a legal voyage and contract, but are mistaken, the premium shall be returned.[64] But where a supposed deviation has been made, and the insurer, for an additional premium, agrees in the margin of the policy for an additional premium that it shall not affect the risk, the fact that the en-

[57] Kelly v. Solari, 9 Mees. & W. 55, per Parke, B., and cases following. "A person is entitled to a return of the premium when the contract is voidable . . . . on account of facts of the existence of which the insured was ignorant without his fault": Cal. Civ. Code, sec. 2619.

[58] De Halin v. Hartley, 1 Term R. 343; McKee v. Phœnix Ins. Co., 28 Mo. 383; Etting v. Scott, 2 Johns. (N. Y.) 157.

[59] Hazard v. Franklin F. Ins. Co., 7 R. I. 429.

[60] Stone v. Marsh, 6 Barn & C. 551; Davidson v. Case, 8 Price, 542; Grimson v. Woodfall, 2 Car. & P. 41; Simpson v. Burrill, L. R. 3 App. Cas. 279; Mason v. Sainsbury, 3 Doug. 61; Leutterell v. Reynell, 1 Wood (C. C.), 282.

[61] Taylor v. Summer, 4 Mass. 56.

[62] Murray v. Buckley, 1 N. Y. Supp. 247.

[63] In re Equitable Reserve Fund L. Assn., 131 N. Y. 354; 43 N. Y. St. Rep. 204; 30 N. E. Rep. 114.

[64] Hentig v. Stainforth, 5 Maule & S. 122; Henty v. Stainforth, 1 Stark. 254; Oom v. Bruce, 12 East, 225.

tire deviation had not been made as supposed does not entitle the assured to a return of the premium so paid.[65] Where a mistake of law is made by both parties in ignorance of the facts, and in consequence an additional premium is paid, such a mistake cannot be used to the prejudice of either party, and the additional premium must be returned.[66]

§ 1402. Whether Premium Returnable where Foreign Company has not Complied with State Laws.—In so far as the decisions of a state hold that noncompliance by a foreign company with the statutes under which alone it is authorized to do business therein renders the policy void,[67] it would seem to logically follow that the premium paid under such policies should be recovered back. It has been held that a premium note given under such circumstances is not enforceable.[68] But it is also held that the policy holder is not excused thereby from payment of his premiums, and that the policy is valid.[69] So it is declared in Indiana that the insured may, both as to the company and its agents, recover back his premiums paid under such a contract, irrespective of the doctrine of recovery of the consideration upon rescission.[70]

§ 1403. Return of Premium—Breach of Warranty. If there be a breach of warranty, express or implied, rendering the policy void ab initio, there being no actual fraud, the premium is returnable.[71] So where in a fire policy on lumber there was a warranty for maintaining a continuous clear space

[65] Crowningshield v. New York Ins. Co., 3 Johns. Cas. (N. Y.) 142.

[66] Scriba v. Insurance Co. of North America, 2 Wash. (C. C.) 107.

[67] See secs. 332, 333, herein.

[68] Hoffman v. Banks, 41 Ind. 1; Gent v. Manufacturers' etc. Mut. Ins. Co., 107 Ill. 652; 13 Ill. App. 308; Washington Mut. Ins. Co. v. Hastings, 2 Allen (Mass.), 398; Ætna Ins. Co. v. Hawey, 11 Wis. 394; Barbor v. Boehm, 21 Neb. 450. See sec. 333, herein.

[69] Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67. See sec. 330, herein.

[70] Union Central L. Ins. Co. v. Thomas, 46 Ind. 44. See, also, Thorne v. Travelers' Ins. Co., 80 Pa. St. 15; Haverhill Ins. Co. v. Prescott, 42 N. H. 547.

[71] Delavinge v. United States Ins. Co., 1 Johns. Cas. (N. Y.) 310; Elbers v. United Ins. Co., 16 Johns. (N. Y.) 128; Waddington v. United Ins. Co., 17 Johns. (N. Y.) 23.

between the lumber and a sawmill, which warranty was untrue when made, and no risk ever attached, in the absence of intentional fraud by the assured the premiums paid are returnable.[72] So also if the ship be unseaworthy at the time the risk would commence, and the risk does not attach,[72a] or there be a breach of warranty of neutrality, so that the risk does not attach;[73] or there is a breach of warranty of the time of sailing;[74] or the ship being insured with warranty to sail from a certain port with convoy for the voyage, and on arrival there finds the convoy gone, and never sails on the voyage, the insured having given notice immediately to the underwriters, the premium is returnable from the time of the breach, on the ground that there are two distinct contracts, but is not returnable for the risk run prior to the breach.[75] So in case of a warranty to depart with convoy, which is not satisfied, the premium is returnable as to that risk to which the warranty relates.[76] And although a vessel may not be seaworthy for the voyage, but is seaworthy for port, and the policy has attached in port, there shall be no return of the premium.[77] And there shall be no return of the premium for a deviation on the voyage, for the deviation annuls the contract as to subsequent ports of the voyage, and not the contract ab initio, and forfeits the premium, the risk being entire.[78]

[72] James v. Insurance Co. of North America, 90 Tenn. 604; 18 S. W. Rep. 260.

[72a] Taylor v. Lowell, 3 Mass. 331; Richards v. Marine Ins. Co., 3 Johns. (N. Y.) 307; Annan v. Woodman, 3 Taunt. 299; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Porter v. Bussey, 1 Mass. 436; Graves v. Marine Ins. Co., 2 Caines (N. Y.), 339; Scriba v. Insurance Co. of North America, 2 Wash. (C. C.) 107.

[73] Henckel v. Royal Exch. Assur. Co., 1 Ves. 317.

[74] Meyer v. Gregson, 3 Doug. 402, reported in 1 Marshall on Insurance, ed. 1810, 658.

[75] Stevenson v. Snow, 3 Burr. 1237, per Lord Mansfield; Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield.

[76] Long v. Allen, 4 Doug. 277.

[77] In this case the policy was "at and from," and the vessel had arrived at the outer port and had taken on a cargo for the homeward voyage: Annan v. Woodman, 3 Taunt. 299. See Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1.

[78] Hearne v. Marine Ins. Co., 20 Wall. (U. S.) 488; Tait v. Levi, 14 East, 481; Bermon v. Woodbridge, 2 Doug. 781

§ 1404. Premium Returnable for Misrepresentation or Concealment of Assured without Fraud.—If the policy is avoided by a misrepresentation of the assured made without fraud, the premium is returnable,[79] especially where the company has positive knowledge of that which it insists effected the forfeiture, for in such case it would be inequitable for the company to retain the premium, and at the same time claim that it is not bound thereby.[80] Thus, a representation that lamps were not used in the building and they were, and the loss was occasioned thereby, avoids the policy, and the risk never having attached, and there being no fraud on the part of the assured, the premium shall be returned.[81] So also where the insured represents that the building is furnished with a brick chimney, and it is not, the policy does not attach, and the premium is returnable.[82] So also where the interest of the insured mortgagee is not the sole ownership as represented, there being no fraud, the premiums are returnable, as the risk has never attached.[83]

§ 1405. Premium not Returnable—Policy Illegal—Parties in Pari Delicto.—If the contract be illegal in its inception as being a wager policy, or one illegal as being prohibited by positive law, the parties being pari delicto, and the premium having been paid and the risk run, the premium is not returnable.[84] But a premium paid for insuring lottery tickets has been held returnable, the parties not being in pari

[79] Feise v. Parkinson, 4 Taunt. 640; Penson v. Lee, 2 Bos. & P. 330.

[80] Williamsburg City F. Ins. Co. v. Cary, 83 Ill. 453.

[81] Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235; 2 Wood & M. (U. S.) 472.

[82] Scott v. Niagara Dist. Mut. Ins. Co., 25 U. C. Q. B. 119.

[83] Waller v. Northern Assur. Co., 64 Iowa, 101.

[84] Russell v. De Grand, 15 Mass. 35; Andree v. Fletcher, 3 Term Rep. 266; Lowry v. Bourdrea, 2 Doug. 468; Paterson v. Powell, 2 L. J. Com. P., N. S., 13; Juhel v. Church, 2 Johns. Cas. (N. Y.) 333; Vandyck v. Hewitt, 1 East, 96; Morck v. Abel, 3 Bos. & P. 35. The English statute, 8 & 9 Vict., c. 109, sec. 18, forbids all wagers. As to the general rule that money paid under an illegal contract cannot be recovered back, see Edgar v. Fowler, 3 East, 225, per Lord Ellenborough; 1 Story's Equity Jurisprudence, 6th ed., 69; Danforth v. Evans, 16 Vt. 538; Taylor v. Chester, L. R. 4 Q. B. 309; Welsh v. Cutter, 44 N. H. 561.

delicto.[85] A distinction has been made in some of the early English cases between contracts executed and executory, it being held that before the event happens, and while the contract is executory, the money paid or advanced may be received back;[86] and such was the opinion of Butler, J., in Lowry v. Bordien,[87] although Lord Mansfield held in that case that the policy, being without interest, was a gaming policy against the statute, and the court would not interfere to assist either party, in accordance with the maxim that in pari delicto melior est conditio possidentis, thereby implicitly not concurring in the opinion of Butler, J., although in this case the action was not brought until after the risk had been run. So Lord Ellenborough doubted the soundness of the distinction when it was sought to recover back premiums under illegal insurances, and in this opinion Lord Tenterden[88] coincided, on the ground that the contract was completed and the consideration paid.[89] Mr. Marshall, however, notes a case of two wagers in the nature of wagering insurances, where, although the action, which was brought on the ground that the plaintiff had won his wager, was nonsuited, Lord Mansfield permitted a return of the premium,[90] and that author is of the opinion that Mr. Justice Butler's doctrine applied only "to the case of an insurance without interest innocently made." [91] Mr. Arnould doubts whether the distinction between contracts executed and executory can be sustained as to illegal insurances, and says that if both parties are in pari delicto, "and no case of oppression or peculiar hardship be made out, the simple and intelligible rule of potior est conditio possidentis ought to apply in all its generality." [92]

[85] Jacques v. Golightly, 2 W. Black. 1073.

[86] Aubert v. Walsh, 3 Taunt. 276; Tappenden v. Randall, 2 Bos. & P. 467. As to the general rule, see, also, Hasleton v. Jackson, 8 Barn. & C. 221; Cotton v. Thurland, 5 Term Rep. 405; Edgar v. Fowler, 3 East. 225; Smith v. Bickmore, 4 Taunt. 474.

[87] 2 Doug. 468.

[88] Then Abbott, J.

[89] Palyart v. Leckie, 6 Maule & S. 290.

[90] Wharton v. De la Rive, at N. P. 1782, reported in 2 Marshall on Insurance, ed. 1810, 642, note a.

[91] 2 Marshall on Insurance, ed. 1810, 643.

[92] 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1235, *1221.

Mr. Phillips states the rule thus broadly: "If the contract is void on account of illegality, the assured is, in general, not entitled to a return of the premium, upon the principle that when parties are in pari delicto, neither has a remedy against the other." [93] So also Mr. Parsons.[94] In Massachusetts it is held that the amount of a premium note given on an illegal insurance is not collectible.[95] In cases of wagers generally it is also held that a promissory note executed upon a void wager cannot be collected.[96] It would be difficult, however, to deduce a rule applicable to illegal insurances from analogous cases of wagers and like illegal contracts generally, for in such cases the matter is one largely dependent upon statutory regulations in the several states. Thus, while it is held if the contract is executed and the money paid it cannot be recovered back, yet in many of the states money paid on an illegal wager can by statute be recovered back, and other decisions hold that where a wager contract is not executed, that is, the event has not transpired or the money paid over, the contract may be rescinded and the money is returnable.[97] In a New York case it is declared that if a wager contract is void as against public policy, it would be unconscientious for the insurer to retain the premium.[98] The difficulty, therefore, of stating a rule which is less general than the one given at the beginning of this section, is apparent. It would seem, however, extremely doubtful if parties to an illegal contract of insurance, being both in pari delicto, have any standing in court to claim a return of the premium, even though the event has not occurred or the risk run, except in cases where

[93] 2 Phillips on Insurance, 3d ed., sec. 1846.

[94] 1 Parsons on Marine Insurance, ed. 1868, 515. See, also, 2 May on Insurance, 3d ed., 1304, sec. 567.

[95] Russell v. De Grand, 15 Mass. 35.

[96] Eldred v. Molloy, 2 Colo. 320; 25 Am. Rep. 752. See, also, Conley v. Hillegras, 94 Pa. St. 132; 39 Am. Rep. 774; Blasdel v. Fowle, 120 Mass. 447; 21 Am. Rep. 533. But see Boughner v. Meyer, 5 Colo. 71; 40 Am. Rep. 139, where a check so given was held valid in the hands of a bona fide transferee.

[97] For a review of the law as to wagers and illegal contracts, see 7 Wait's Actions and Defenses, 83-91; 2 Parsons on Contracts, 7th ed., 758, *626, et seq., 896, *755, et seq.

[98] Mount v. Waite, 7 Johns. (N. Y.) 434.

some statute provides a remedy, or perhaps in cases of oppression or peculiar hardship, or those where public policy clearly necessitates the court's interference. The rule necessarily excludes those cases where the circumstances are such that the parties are not both in pari delicto. Lord Mansfield has made an exception by holding that the parties are not in pari delicto in cases where the prohibitory statute, by virtue of which the contract is made illegal is intended to prevent oppression or imposition upon one set of men by another.[99] And in other cases than those concerning insurances relating to contracts in violation of law it has been held in law and equity that two parties may concur in an illegal act without being necessarily in all respects in pari delicto, and also that the case may be such that public policy requires the court's interference.[100] If the policy is made illegal by a subsequently enacted statute, the risk having attached, both parties are discharged from their contract obligation, and the insurer loses his premium.[101] So if the policy is invalid, and the insured was guilty of no fraud in procuring it, the premium is returnable.[102] But if a policy is intended to cover a trade, in contravention of the regulations of a statute, the assured, even though a foreigner and ignorant of the law, is not entitled to a return of the premium.[103] And a license to trade in a prohibited district cannot operate retrospectively so as to entitle the assured to a return of the premium, even though the license was procured before the insured knew of the loss;[104] although where both parties intended a license should be procured, the premium is returnable, even though the same is afterward declared invalid;[105] and so also in case of trading with an enemy, the same being undertaken owing to a mistaken construction of a license.[106] But

[99] Browning v. Morris, 2 Cowp. 790.

[100] Osborne v. Williams, 18 Ves. 379; Reynell v. Sprye, 1 De Gex, M. & G. 660; 1 Story's Equity Jurisprudence, 9th ed., 284, 286; Clough v. Ratcliffe, 16 L. J. Ch. 477.

[101] Gray v. Sims, 3 Wash. (C. C.) 276.

[102] Mutual Assur. Co. v. Mahon, 5 Call. (Va.) 517.

[103] Morck v. Abel, 3 Bos. & P. 35.

[104] Cowie v. Barber, 4 Maule & S. 16.

[105] Siffkin v. Allnutt, 1 M. & S. 39.

[106] Siffkin v. Allnutt, 1 M. & S. 39.

the rule in pari delicto does not apply to a case where the broker receives money from the underwriters for the use of the assured, the contract being illegal, but such money may be recovered from the broker as money received to and for the use of assured.[107]

§ 1406. Premium not Returnable—Policy Void for Fraud of Assured or His Agent.—If the policy is void by reason of the fraudulent representation or concealment of the assured or his agent, or if, by deception and false pretenses in matters material to the risk, he induces the assurer to assume a risk which would either have been refused or if taken at all would only have been taken on different terms, there shall be no return of the premium.[108] If a wife intends to defraud the insurer, or knowingly participates in its agent's fraud, in procuring a policy on her husband's life without his knowledge and against the company's rules, there can be no recovery back of premiums paid on such policy, and there being evidence from which the jury may or may not find her innocent of such fraud or participation, it is error to refuse a charge of the character above stated.[109]

§ 1407. Premium not Returnable—Material Alteration of Policy.—If there be a material alteration of the contract by the assured without consent of the assurer, whereby it is avoided, the premium is not returnable, even though there is no fraud on the part of the assured, for it is a general rule

[107] Tennant v. Elliott, 1 Bos. & P. 3. See Smith v. Linds, 5 Com. B., U. S., 587.

[108] Himely v. South Carolina Ins. Co., 1 Mill Const. (S. C.) 153; 12 Am. Dec. 623; Blaeser v. Milwaukee Mut. Ins. Co., 37 Wis. 31; 19 Am. Rep. 747; Lewis v. Phœnix Ins. Co., 39 Conn. 100; Hoyt v. Gilman, 8 Mass. 336; Prince of Wales Assur. Co. v. Palmer, 25 Beav. 605; Friesmuth v. Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587; Waters v. Allen, 5 Hill (N. Y.), 421; Chapman v. Frazer, 3 Burr. 1361; Trabandt v. Connecticut M. L. Ins. Co., 131 Mass. 167; Schwartz v. United States Ins. Co., 3 Wash. (C. C.) 170; Carter v. Boehm, 3 Burr. 1909. Formerly otherwise: See cases cited and doubted in Marshall on Insurance, ed. 1810, 648-52.

[109] Fisher v. Metropolitan L. Ins. Co., 162 Mass. 236; 35 N. E. Rep. 849.

that the assured cannot by his own act, the risk having attached, rescind the contract, and so compel a return of the premium, although he might have prevented the inception of the risk.[110]

§ 1408. Return of Premium—Breach of Contract by Assurer.—If the contract is valid and the company is lawfully entitled thereunder to receive premiums, and there is nothing which shows that the refusal of the company to fulfill its contract is not fully justified by its terms, an action for a return of premium cannot be maintained.[111] So also in case of assessments claimed to be recovered back as overpayments, there shall be no return where there is a finding that the same are lawfully levied, and duly and properly used by the company, and that they were voluntarily paid by the assured with a full knowledge of all the facts.[112] Again, a policy of life insurance stipulated that default in the payment of any of the annual premiums to become due after the first two should not work a forfeiture of the policy, but that the amount insured should be then commuted or reduced to the sum of the annual premiums paid. The insured brought suit to have the contract declared rescinded, and to obtain a decree against the insurance company for the sums which he paid as premiums, upon the ground that the company asserted that the policy was forfeited by his failure to pay, and declined to issue a "paid-up policy" equal to the sum of the several annual premiums paid. It was held that such suit could not be maintained where the only obligation imported by the terms of the policy was to pay within ninety days after due notice and proof of

[110] Langhorn v. Cologan, 4 Taunt. 430, per Lord Mansfield, who says: "The underwriter has fulfilled his part. The assured can no more compel the underwriter to return the premium than the underwriter can compel him to relinquish the contract." The case was one of insurance on goods and merchandise generally, and on the vessel, and written words were inserted describing specific goods without the consent of the defendant assurer.

[111] Continental L. Ins. Co. v. Houser, 89 Ind. 258.

[112] Clancey v. Mutual Reserve Fund L. Assn. (N. Y. City Ct. 1891), 10 Court Jour. 1.

the death of the assured.[113] But where there is a breach of the contract obligations by the insolvency of the assurer, the assured, who is the holder of a cash premium policy, is entitled to a return of his premiums.[114] And the assured may rescind and recover back all premiums paid with interest in an action for money had and received where the company violates its contract, by transferring all its assets to another company and ceasing to do business.[115] And where the company refuses to receive a premium when due, it is held that at least all the premiums paid may be recovered back with proper interest.[116] So in an action to recover back the premiums paid on the ground that the company had unlawfully declared a forfeiture, it was held that a forfeiture could not be presumed, and that a recovery should be had for the premiums paid, even though the company had carried the risk for a time.[117] So the assured is entitled to recover back the premiums on a policy improperly canceled,[118] and if the company, by virtue of an act of the legislature, abandons its plan of insurance without the assured's knowledge or consent, and thereby reduces its funds upon which the assured relies for payment of endowments contracted for, he may rescind the contract, and is entitled to a return of his assessments paid thereon.[119] So also are the premiums returnable when the company does not deliver the pol-

[113] Harlow v. St. Louis Mut. L. Ins. Co., 54 Miss. 425; 28 Am. Rep. 358. See Continental L. Ins. Co. v. Houser, 111 Ind. 266.

[114] In re Minneapolis Mut. F. Ins. Co. (Powell v. Wyman), 49 Minn. 291; 51 N. E. Rep. 921; Clark v. Manufacturers' Mut. F. Ins. Co. (Ind. 1892), 30 N. E. Rep. 212.

[115] Meade v. St. Louis Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 1.

[116] Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; McCall v. Phœnix Mut. L. Ins. Co., 9 W. Va. 237; 27 Am. Rep. 558; Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610; McKee v. Phœnix Ins. Co., 28 Mo. 383; 75 Am. Dec. 129; Ætna L. Ins. Co. v. Paul, 10 Bradw. (Ill.) 431; Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; 29 Am. Rep. 200. But see Spier v. Mutual L. Ins. Co., 36 Hun. (N. Y.), 322.

[117] American L. Ins. Co. v. McAden, 109 Pa. St. 399 (one judge dissenting). But see Lovick v. Provident L. Assn., 110 N. C. 93; 21 Ins. L. J. 332.

[118] Braswell v. American Ins. Co., 75 N. C. 8.

[119] People's Mut. Assur. Fund v. Bricken, 92 Ky. 297; 17 S. W. Rep. 625.

icy as agreed, although the parol contract has attached.[120] And where a policy was issued by the company's agent, who allowed a rebate of premiums, and the evidence tended to show a ratification by the company of its agent's acts, and the company repudiated the contract after the third year's premium was tendered, the whole amount of the premiums paid were allowed to be recovered with interest, although the insured had received the benefit of the insurance for the years the policy was in force.[121]

§ **1409. Return where Note is Given.**—Although a premium note is given, if the maker thereof is entitled to a return of the premium on the same policy, he may have the amount of the return deducted from the amount of the note;[122] and this is so held although the maker was at the same time indebted to the insurers for other notes given for premiums on other policies of insurance, and had become insolvent.[123] And the rule obtains where a promissory note is given for the premium, which note is prima facie payment thereof, the insurer having acknowledged in the policy the receipt of the premium, and the insured may recover the return premiums by an action for money had and received, though his note remains unpaid.[124] As will be observed, this is not the case of a promissory note conditionally received in payment, the policy to be forfeited if it is not paid at maturity.[125]

§ **1410. Return for Want of Interest.**—If through mistake, misinformation, misdescription, or other innocent cause, an insurance be effected which is not illegal, and the insured has in fact no interest whatever at risk, so that the underwriters are not liable for a loss, there shall be a return of the premium.[126] Thus, where the captors of a vessel had no claim

[120] Collier v. Bedell, 39 Hun (N. Y.), 238. But see Leonard v. Washburn, 100 Mass. 251.

[121] Thompson v. New York L. Ins. Co., 21 Or. 466; 28 Pac. Rep. 628.

[122] Phœnix Ins. Co. v. Fiquet, 7 Johns. (N. Y.) 383.

[123] Phœnix Ins. Co. v. Fiquet, 7 Johns. (N. Y.) 383.

[124] Hemmenway v. Bradford, 14 Mass. 121.

[125] Martin v. Sitwell, 1 Show. 156.

[126] Martin v. Sitwell, 1 Show. 156; Steinback v. Rhinelander, 3 Johns. Cas. (N. Y.) 269; 2 Marshall on Insurance, ed. 1810, 639; 2 Phillips on

of right, it being seized before war was actually declared, they were held to have no insurable interest, and the premium was returned.[127] So if the policy is issued without any insurable interest in the property, there is no consideration for the payment of the premiums, and the company cannot, in equity and good conscience, retain them, and the same may be recovered back in an action for money had and received.[128] And if the ship is insured and there is no interest other than a bottomry interest, the premium shall be returned;[129] and the premium may be recovered back when paid for insurance on goods expected at the insured's own risk, but which come only consigned to him.[130] But where a policy is fraudulently obtained by one upon the life of another, in whom he has no insurable interest, there can be no recovery back of the premium, for the party seeking a return is estopped to show a want of insurable interest.[131] But the premium is not returnable for want of insurable interest if the risk has been run, as in case of an insurance on ship and freight, and safe arrival, and defective title to the ship.[132]

§ 1411. Proportionate Return—Overvaluation—Short Interest.—If the insurance in a single policy be to a larger amount than the real value of the property actually covered and at risk, there shall be a proportionate return of the premium for short interest, because the insurer shall not receive the price of a risk which he has not run, and so even though there is no stipulation for such proportionate return.[133]

Insurance, 3d ed., 504, sec. 1824; 2 Arnould on Marine Insurance, Perkins' ed. 1868, 1239, sec. 424.

[127] Routh v. Thompson, 11 East, 428. See, also, Boehm v. Bell, 8 Term. Rep. 154.

[128] New Holland Turnpike Co. v. Farmers' Mut. Ins. Co., 144 Pa. St. 541; 22 Atl. Rep. 923; 48 Leg. Intell. 527.

[129] Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250.

[130] Toppan v. Atkinson, 2 Mass. 365.

[131] Lewis v. Phœnix Mut. L. Ins. Co., 39 Conn. 100.

[132] McCulloch v. Royal Exch. Co., 3 Camp. 406.

[133] 2 Marshall on Insurance, ed. 1810, 639; Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329; Finney v. Warren Ins. Co., 1 Met. (Mass.) 16; Foster v. United Ins. Co., 11 Pick. (Mass.) 85; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1241, *1226, et seq., sec. 425.

Mr. Phillips says a proportionate premium shall be returned for short interest on "a policy subscribed by only one underwriter or one company or one set of joint underwriters," and that "it is observed that Mr. Marshall[134] limits his proposition to an 'insurance in a single policy,' though the French Ordonnance of 1681 and Valin's commentary referred to by him, explicitly extend the rule to divers policies"; and he is also of the opinion that there shall be a proportionate return of the premium in case the same policy is subscribed by several underwriters, each for a distinct amount.[135] If one of the joint owners of a ship effects a policy to the full value of the ship in his own name, the loss being averred to be in him only, it is held that he is entitled to a return of one-half of the premium paid on the whole sum, and can recover for the loss only according to the value of his interest proved.[136] And where the insured's interest in the cargo, he being one of the joint owners, was of the value of thirteen thousand dollars, and the whole amount at risk was twenty-five thousand dollars, the insured was held entitled to a proportionate return of premium for the differ-

The French Ordonnance of 1681 provides for a return of the premium on the surplus by the insurers "in the case of one policy made without fraud which exceeds the value of the effects shipped," and Emerigon applies this clause to insurers who under the same date have signed the policy, but distinguishes between this and a case where there are several policies: Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 4, p. 658. He says: "It is necessary to distinguish the case where there is only a single policy from that in which there are several. 'In the case,' says the Ordonnance, 'of one policy made without fraud which exceeds the value of the effects shipped, it shall subsist proportionably to the valuation. In case of loss, the insurers shall be held each in proportion to the sums by them insured, as also to return the premium on the surplus'; Art. 23, h. t. Thus, the insurer who under the same date has signed the policy last shall participate as well as the first in the profit or the loss. That is to say, that livre for livre (au sol la livre) they shall bear the loss in proportion to the valuation of the effects insured, and shall profit by the premium only in the same proportion; the whole relatively to the sums by them insured. . . . . The same decision is found in the forms of Hamburg, Antwerp, Rouen, and Bordeaux": Id.

[134] See 2 Marshall on Insurance, ed. 1810, 639.

[135] 2 Phillips on Insurance, 3d ed., 514, secs. 1836, 1837. See sections next following.

[136] Murray v. Columbia Ins. Co., 11 Johns. (N. Y.) 302.

ence.[137] So also in case of a policy on profits, if only part of the goods are at risk, a proportionate return of the premium shall be had.[138] And there may be a proportionate return of the premium where the amount of insurance on a debtor's life by his creditor exceeds, by mistake of law of both parties, the actual debt on which his insurable interest is based.[139] So also shall there be a proportionate return of the premium if a part only of the goods are shipped, whether the policy be a valued or open one, although in case of a valued policy, if all the property is put at risk, there shall be no return of the premium for overinsurance.[140] But an action for return of premium on account of short interest will not lie if the plaintiff's interest to the extent insured is covered at any time during the voyage.[141]

§ 1412. Whether Premium Returnable for Overinsurance by Several Insurers—Pro Rata Contribution.—Some question has been made concerning the right of the assured to a proportionate return of the premium in cases of several insurers or of several policies, and also whether, in case of a right to such return, there shall be a pro rata apportionment among the several underwriters. The classes of overinsurance presented and considered by the authorities are these: 1. Where there are several insurers of separate amounts under one policy, all the insurances aggregating an excess of the value of the interest covered; 2. Where there are several policies aggregating an excess of such value, all made prior to the commencement of the risk and all attaching; 3. Where there are several policies aggregating an excess of such value, which take effect simultaneously; 4. Where there are successive insurances, and the prior policy or policies equal the value of the property, while the subsequent insurance represents the excess in amount: 5. Where the prior policy or policies do not equal the value of the

[137] Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329.

[138] 2 Phillips on Insurance, 3d ed., 507, sec. 1831.

[139] London etc. Ins. Co. v. Lapione, 1 Leg. News, 506.

[140] 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1241, 1242.

[141] Howland v. Com. Ins. Co., Anth. N. P. (N. Y.) 26; 2 Arnould on Marine Insurance, Perkins' ed. 1868, 1241.

property, and the subsequent insurance attaches up to the value, the aggregate of all the policies exceeding such value.

§ 1413. Same Subject—Opinions of the Text-writers. Emerigon, having reference to the Ordonnance, distinguishes between the case of one policy by several insurers who under the same date have signed the policy, and the case where there are several policies, the insurance in both classes being made without fraud. In the first case, the insurers are to bear the loss, each in proportion to the sums by them insured, and to return the premium "in the same proportion, the whole relatively to the sums by them insured." If there are several policies, and the first equals the value of the effects shipped, it shall subsist alone, and the other or subsequent insurers are released and must return the premium. If the first policy does not equal the value of the property at risk, the second insurer shall answer for the surplus, and that several policies of the same date form but one, and come into concurrence.[142] Mr. Marshall instances the cases of a policy by several insurers and several policies. In the first he declares that all the underwriters must repay a part of the premium in proportion to their respective subscriptions, without regard to the priority of their dates, and in case of several policies made without fraud, such policies make in effect but one insurance, valid to the extent of the true interest of the assured, all the underwriters being liable to the extent of the value, without regard to the priority of dates, and are bound equally to make a return of the premium for the residue in proportion to their respective subscriptions.[143] Mr. Arnould first states the general proposition that if the insurer could at any time, under any conceivable circumstances, have been obligated to pay the whole sum on which he has received the premium, the premium is then earned, and is not returnable, but if he could never in any event have been obligated only to a part of the amount of his subscription, that he must return a proportionate amount of the premium or

[142] Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 4, 658, et seq.

[143] 2 Marshall on Insurance, ed. 1810, 639, 640.

the residue. He then considers the case of double insurances, when, after effecting one insurance on his property, the merchant, who is ignorant of its real value, in order to fully protect himself, effects other policies with different underwriters, and says the law is clearly settled in England that there can be a recovery only to the extent of the value from any set of underwriters, leaving them to contribute ratably amongst themselves to the loss, and that the insured is entitled "to a ratable return of premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the property at risk." He adds that in case of over-insurance on a single policy, all the underwriters thereon contribute ratably to the return of premium, without regard to the date of their subscriptions, and that Mr. Marshall's rule on this point is "accurately laid down," and that the rule stated by Emerigon, that several policies on the same date are considered as one policy, obtains and is the rule in England. The rule as to return of the premium in such case is the same as in the last. Mr. Arnould next considers the case where there are several policies of different dates on the same subject, and states Mr. Marshall's rule on this point already given, and notes that subsequent writers have recognized that rule, but have made adverse comments thereon,[144] and says that the English law in such case is, that the underwriters on the prior policies which do not equal the value at risk shall make no return of the premium, as they have earned the same, but that the underwriters on the subsequent policies shall make a ratable return.[145] Mr. Phillips considers first the case of a policy "having divers distinct subscriptions for separate amounts," and says there is reasonable ground for the conclusion that the construction of such a policy "will be in favor of a return of premium for short interest, though the policy contains no provision for such a return," and that if the subscriptions are simultaneous, or if they "are all made prior to the commencement of

[144] Referring to Stevens on Average, 5th ed., tit. Return of Premium, pp. 205, 207-15; McCulloch's Commercial Dictionary, ed. 1837, tit. Marine Insurance, p. 702.

[145] 2 Arnould on Marine Insurance, Perkins' ed. 1850, pp. 1226-32, 1240-46, sec. 425.

the risk, they all attach, and are all subject to a return of premium pro rata," without any question as to the right to a return, the only point being whether the return is to be made on the latter subscriptions or all of them pro rata, and says "in this respect the London custom seems, according to Mr. Marshall, to have changed since Lord Holt's time"; the decision referred to being one where it was held that prior insurers were liable to the full value, the subsequent ones not so, but only liable for a return of premium.[146] Mr. Phillips next considers the case of "divers distinct, independent policies," exceeding in the aggregate the true value of the interest, each policy being under that amount, and no provision for a return. He says: "According to uniform jurisprudence of a whole century, beginning in England and followed in the United States, the presumption has been that the policies are to be treated as double insurances," with the exception of one decision, which he notes at length and distinguishes.[147] He further considers the rule given by Mr. Marshall, and declares it to be "plainly erroneous in reference to a return of the premium on prior policies effected while the risk is pending and until the value of the subject is covered," on the ground that the underwriters on prior policies are liable for a loss until the subsequent insurances are effected, and the premium is therefore earned, and at the most the rule could only be applicable where all the policies attach before the risk commences.[148] In conclusion, this author states no rule other than this, that if it appears that "an overinsurance was not intended by the assured nor understood by the underwriters," there shall be a return of the premium for the "excess of the insurance" by "the later of the policies made while the risk is pending, and a pro rata return" on "all

[146] Referring to the African Co. v. Bull, Show. 132; Gilb. 238, and Mr. Marshall's statement that "the custom" proven in that case and upon which the decision was based "seems now to be forgotten, for at present the underwriters would be held all liable in proportion to their several subscriptions": See 1 Marshall on Insurance, ed. 1810, *149.

[147] Referring to Fisk v. Masterman, 8 Mees. & W. 165; 10 L. J. Ex. 306.

[148] Citing Parke, B., and Lord Abinger, C. B., in Fisk v. Masterman, 8 Mees. & W. 165; 10 L. J. Ex. 306.

the insurances which take effect simultaneously," although there be no stipulation therefor that a double insurance is prima facie presumed, the burden of proof being "on the party asserting the contrary." [149] Mr. Parsons thinks the whole subject in an obscure position, although he says this: "If there be many simultaneous policies on the same subject matter, no one of which is beyond the interest, but all together are, as all make but one insurance with mutual claim of contributions, there is a return of premium paid pro rata by all. If the policies are not simultaneous the same rule seems to apply, except in cases where the later ones were not made until after the former ones attached," in which case the prior insurances might have been held for the whole loss, and as to them there is no return, but that "it should follow that the later policies made after the whole interest was covered should return pro rata, according to the excess of the premium over what they could in any event have been liable to pay"; that policies may be simultaneous, even though made on different days and bear different dates; that the presumption is that policies of the same date are simultaneous, but that they may be proven otherwise by evidence of the order of signing, although this may be rebutted by proof that they were intended to be simultaneous, and that policies, "if for the same parties, on the same property, against the same risks," are regarded "very much as if they constituted one policy; in that case the insured may recover his whole amount from any one or more whom he elects to sue" up to the amount of the loss.[150]

§ 1414. Same Subject—The Case of Fisk v. Masterman. In the case of Fisk v. Masterman,[151] a marine risk noted by nearly all the text-writers on this subject, there were several insurances written by several underwriters on the twelfth, their total amount being less than half the value of the property insured. Several policies were on the thirteenth effected with

[149] 2 Phillips on Insurance, 3d ed., 515, 520, secs. 1837, 1838, and see Id. 504, sec. 1823.

[150] 1 Parsons on Marine Insurance, ed. 1868, 291-96, 511, 512, and notes.

[151] 8 Mees. & W. 165; 10 L. J. Ex. 306.

several other underwriters for an amount, which being added to the prior insurances aggregated an excess of about six thousand one hundred and sixteen pounds overinsurance, thus, the first set aggregated fourteen thousand one hundred and fifty pounds, the second set twenty-two thousand three hundred pounds, and the value of the property was thirty thousand three hundred and thirty-three pounds. The premium paid to the first set of underwriters was at a much higher rate than that paid to the second set. The underwriters with whom the policies were effected on the twelfth were held, the risk having attached, to have earned their premium, and to be entitled thereto, inasmuch as they might have been liable to the whole amount of their policies up to the time the later set of policies attached. It was also held that the amounts under all the policies should be aggregated to ascertain the overinsurance, and that the policies effected on the thirteenth should contribute ratably to a return of the premium in proportion to the respective amounts insured. It is on this decision that Mr. Arnould bases the English rule,[152] applicable in similar cases, saying that it is an important modification of the doctrine stated by Mr. Marshall, and assimilates the English to the Continental rule. While Mr. Phillips says of the case that he is reluctant to put so broad a construction thereon as to agree that it overrules "the whole array of antecedent rulings and judgments in England, respecting double insurances supported by the American jurisprudence";[153] and Mr. Parsons says: "It is obvious that the reason on which this decision is based will only apply to cases where the risk actually commences under the first insurance before the second is effected."[154]

§ **1415. Same Subject—Code Provisions.**—In California, express provisions are made by the code concerning the return of premium in such cases, it being provided that if there be overinsurance by several insurers, there shall be a "ratable return of the premium proportioned to the amount by

[152] Noted in text under last section.
[153] 2 Phillips on Insurance, 3d ed., 519.
[154] 2 Parsons on Marine Insurance, ed. 1868, 512, 513, note.

which the aggegate sum insured in all the policies exceeds the insurable value of the thing at risk";[155] that if the overinsurance is effected by simultaneous policies, the insurers shall contribute to the return in proportion to the amount insured by the respective policies, but that in case of overinsurance by successive policies, those only contribute who are exonerated, by prior insurances, from the liability assumed by them in proportion as the sum for which the premium paid exceeds the amount for which, on account of prior insurance, they could be held liable.[156]

§ 1416. Same Subject—The Rule as to Double Insurances.—In this connection it is without doubt the rule that in cases of double insurances, either simultaneously or by successive policies, the insured may recover the whole amount from any underwriter, and leave that company to seek contribution from the others, or he may recover a proportionate part of the loss from each company. Although he is entitled to but one satisfaction, all the policies are considered as one, the insurers being liable pro rata, and are entitled to contribution to equalize payments made on account of losses. But the rule is subject to such exceptions as arise in cases of express stipulations to the contrary, and fire policies generally express and exact provisions on this subject.[157]

§ 1417. Same Subject—Summary and Conclusion.—Of the text-writers above noted, those who state a positive rule substantially agree that the assured is entitled to a ratable return of the premium in all the cases instanced at the beginning of

[155] These are with a single exception the exact words of Mr. Arnould noted above in the text.

[156] Deering's Annot. Civ. Code Cal., secs. 2620, 2622.

[157] Sloat v. Royal Ins. Co., 49 Pa. St. 14, 18, per the court; 88 Am. Dec. 477; followed in Clarke v. Western Assur. Co., 29 Week. Not. Cas. 237, 240, and following as to pro rata and contribution, Howard Ins. Co. of New York v. Scribner, 5 Hill (N. Y.), 298, 301; followed in Royal Ins. Co. v. Roedel, 78 Pa. St. 19, 22; also adopted in Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28, 35; Wiggin v. Suffolk, 18 Pick. (Mass.) 145; 29 Am. Dec. 576, per Shaw, C. J.; Lucas v. Jefferson Ins. Co., 6 Cow. (N. Y.) 635; Godin v. London Assur. Co., 1 Burr. 489, 492, per Lord Mansfield; 1 W. Black. 103; Ætna Ins. Co. v. Tyler, 16 Wend.

the discussion,[158] but the difficulty arises upon the point of apportionment of premium among the underwriters, where there are several policies of different dates, and Mr. Phillips extends this doubt to all the cases. But the code provisions above noted are substantially a restatement of the rules given by Mr. Arnould as the English rules, at least as to simultaneous policies, and also as to several policies of different dates, where the amount of the first insurance is not equal to the value of the risk, though the aggregate amount of both insurances exceed it. Mr. Arnould declares that in the United States the common-law rule is as stated by Mr. Marshall, but he cites no authority other than Mr. Phillips, and that author, as we have seen, is in doubt as to the doctrine here, and in fact declares that Mr. Marshall's rule "is plainly erroneous" as to prior insurances; while Mr. Parsons, in a note in the edition of 1868 of his work on Marine Insurance,[159] applies Mr. Marshall's rule only to the case of simultaneous policies in the United States, and says the whole subject "needs the light of further adjudication," and the doctrine is unsettled and obscure. Again, the doctrine here as to double insurances differs from the rule as stated by Emerigon under the Ordonnance of 1681, whereby the insurances which equal the "value of the effects shipped . . . . subsist alone, and the other insurers shall go out of the insurance," but if the first "does not equal" such value, "the second shall answer the surplus." [160] So that the principle which underlies the foundation of the rule given by Emerigon for a return of the premium in such cases does not exist in the United States or in England. The difficulty, therefore, of stating a general rule is apparent, and in view of the fact that such learned writers as Mr. Phillips and Mr. Parsons hesitate to formulate a positive rule, we can hardly assume, for want of

(N. Y.) 385; Thurston v. Kock, 4 Dall. (U. S.) 348, 352, per the court. See Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600. And see secs. 2489, 2491, 2492, 2494-2497, herein; 3 Kent's Commentaries, 5th ed., 280, 281; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 298, *293.

[158] See section 1412, herein.

[159] 2 Parsons on Marine Insurance, ed. 1868, 512, note 1.

[160] Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 4, p. 658; c. 1, sec. 7, p. 23; c. ix, sec. 2, p. 214.

additional authority, to go further than they have done; although we would suggest that the conclusion which necessarily follows from the doctrine in this country as to double insurances is not consistent with the rule stated by Mr. Arnould and based upon Fisk v. Masterman.[161] And the rule suggested by Mr. Phillips, as deduced from that case, must necessarily be limited in its application, and the code provisions above noted on this subject seem just and equitable.[162]

§ 1418. Stipulations for Return of Premium—Prior and Subsequent Insurances—The American Clause.—In fire policies, as we have above stated, express provisions are generally made with reference to prior and subsequent insurances on the property, and in marine risks there is usually inserted in the policies what is known as the American clause, which substantially stipulates that if the assured shall have made any other assurance upon the property prior in date, the assurer shall be answerable only for so much of the amount thereof as may be deficient toward fully covering the premises assured, and the assurer shall return the premium on so much of the sum by them assured as they shall be, by such prior insurance, exonerated from; that in case of assurances on the same property subsequent in date, the assurers shall be liable to the full extent of the sum subscribed by them, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no subsequent assurance had been made. The manifest object of such clauses is to prevent contribution, in view of the decisions as to double insurances.[163] In some policies the American clause does not expressly appear, the code provisions being incorporated therein by reference. Under the American clause, it is held that the subsequent in-

[161] 8 Mees. & W. 165; 10 L. J. Ex. 306.

[162] See further on this question, Thurston v. Koch, 4 Dall. (U. S.) 348; Whiting v. Independent Mut. Ins. Co., 15 Md. 297, secs. 2480, 2489, 2491, 2492, 2494-97, herein.

[163] See Kemble v. Boune, 1 Caines (N. Y.), 75; New York Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.) 1.

surers are liable for such proportion of the loss as the amount they insure bears to the whole value, and that this clause is of no effect except in cases of double insurance;[164] also that so much of the clause as relates to prior insurances restricts the insured from recovering the excess of the value of the vessel, when lost, over the amount of the prior insurance, not exceeding the sum insured in said policy.[165] And that part of the clause in an open policy relating to subsequent insurances on the property will not apply in the case of a subsequent valued policy expressed as intended to cover that part of the property left uncovered by the prior open policy.[166] Further consideration will, however, be hereafter given to the construction of this clause.[166a]

§ **1419. When no Return in Case of Several Policies.** Where there are several policies on the same subject, but on different risks, they cannot be taken into consideration in a computation of short interest, nor can there, for that purpose, be an apportionment of premium.[167] And where insurance was effected here on condition that if it had already been effected abroad a certain proportion of the premium was to be returned, it was held that insurance made abroad after the date of the policy here did not entitle the insured to a return of the premium.[168]

§ **1420. Premium not Returnable when Risk Entire.** If the insurance is for a specified term, the risk being entire and indivisible, the premium is earned from the instant the risk attaches, and is therefore not returnable thereafter,[169] and though the voyage consists of several distinct parts and to several places, there shall be no apportionment of the premium if

[164] Whiting v. Independent etc. Ins. Co., 15 Md. 297; Wiggin v. Suffolk Ins. Co., 18 Pick. (Mass.) 145, 153, per the court.

[165] Stephenson v. Piscataqua etc. Ins. Co., 54 Me. 55.

[166] Millaudon v. Western Mut. Ins. Co., 9 La. 27; 29 Am. Dec. 433.

[166a] See sec. 2496, herein.

[167] Howland v. Connecticut Ins. Co., Anth. N. P. (N. Y.) 26.

[168] New York Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.) 1.

[169] Lorraine v. Thomlinson, Doug. 564; 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1230, *1215, et seq., sec. 420; Tyrie v. Fletch-

it be in fact one entire risk and for one entire premium, and not several distinct risks.[170] And if the premium be a gross sum for the year, the fact that it is computed at so much each month does not make it a monthly contract, for the premium is entire.[171] So Lord Mansfield said in a similar case: "They might have insured from two months to two months, or in any less or greater proportion, if they had thought proper to do so. But the fact is they have made no division of time at all, but the contract entered into was one entire contract" for the year; in this case the insurance was a time policy for one year.[172] So one who insures his property for a stated definite period, and the risk having commenced, cannot by his own act, contrary to the terms of the policy, surrender or terminate it at pleasure, and reclaim a ratable return of the premium.[173] So in policies "at and from," the risk being entire and having commenced, the premium is not returnable.[174] A voyage may be entire, though the ship is to go to a number of places, and take in different cargoes, but the voyage may be supposed to have been divided in the contemplation of the parties, where contingencies are introduced in the insurance which at certain periods of the voyage may so operate as to avoid the insurance. Thus, in case goods "out and home" are covered, a proportionate premium to be returned if the re-

er, 2 Cowp. 666; 2 Phillips on Insurance, 3d ed., 508, sec. 1832; 1 Duer on Marine Insurance, ed. 1845, 201; 2 Marshall on Insurance, ed. 1810, 664, et seq.; Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 2, pp. 52, 53; Stone v. Marine Ins. Co., 1 Ex. D. 81; Samuel v. Royal Exch. Assur. Co., 8 Barn. & C. 119.

[170] 2 Marshall on Insurance, ed. 1810, 662, and cases last cited.

[171] Lorraine v. Thomlinson, Doug. 564.

[172] Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield.

[173] Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co., 86 Cal. 248; 24 Pac. Rep. 1018.

[174] Annan v. Woodman, 3 Taunt. 299; Col. Ins. Co. v. Lynch, 11 Johns. (N. Y.) 233; Bermon v. Woodbridge, 2 Doug. 781; Meyer v. Gregson, 3 Doug. 402, reported in 2 Marshall on Insurance, ed. 1810, 658; Moses v. Pratt, 3 Camp. 296; Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 2, p. 53, et seq.; Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch (U. S.), 357; Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408. But see Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield; Gale v. Machell, reported in 2 Marshall on Insurance, ed. 1810, 659.

turns are remitted in bills of exchange, the stipulated pemium is returnable where neither goods nor bills are returned.[175]

§ 1421. Premium Returnable when Risk Divisible.— If the insurance is divisible into separate and distinct risks, the premium may be apportioned with reference to the several risks, and there shall be a proportionate return of the premium covering such risk or risks as have not attached. This rule also applies to cases where from the contract it is evident that it was in the contemplation of the parties that there should be several risks or distinct parts to the contract, and that the premium may be divided in distinct parts with reference thereto.[176] That the contract is divisible may be deduced by construction from the manifest intention of the parties evidenced in the contract, the nature of the contract itself, and the obvious consequences of its terms; as in case of a contingency specified in the policy, upon the not happening of which the insurance ceases. This is illustrated by the case of an insurance on a ship from A to C, warranted to depart with convoy from B. Here it was held that the contract was from A to C, but on a certain contingency only a contract from A to B, which made it a contract divisible into two distinct parts, relative, as it were, to two distinct voyages, and the ship not having complied with the condition as to convoy, and not having sailed from B to C, a proportionate return of the premium was ordered. In this case the policy was "at and from."[177] So in case of a policy "at and from" A and B to C, thence back to A, affixing a separate premium for each risk, and a certain per cent to be returned if the vessel does not go to C, and

[175] Donath v. Insurance Co. of North America, 4 Dall. (U. S.) 471; 2 Phillips on Insurance, 3d ed., 513. See Homer v. Dorr, 10 Mass. 26; Pollock v. Donaldson, 3 Dall. (U. S.) 510.

[176] 2 Marshall on Insurance, ed. 1810, 655; Waters v. Allen, 5 Hill (N. Y.), 421; Bunyon on Insurance, 95; Lovering v. Mercantile M. Ins. Co., 12 Pick. (Mass.) 348; Ogden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 114. See Stone v. Marine Ins. Co., 1 Ex. D. 81; Samuel v. Royal Exch. Assur. Co., 8 Barn. & C. 119.

[177] Stevenson v. Snow, 3 Burr. 1237, per Lord Mansfield; 1 W. Black. 318; Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield; Rothwell v. Cooke, 1 Bos. & P. 172; Long v. Allen, 4 Doug. 276.

after the first risk the vessel is destroyed by fraud of the assured, whereby the other risks are not incurred, the voyage is divisible, and the assured may recover the premium paid for such other risks.[178] Lord Mansfield says, in a case of a policy "at and from," where the contingency is specified, that "there are great difficulties in the way of apportionments, and therefore the court has always seemed against them.[179] And where the contract shows that it is divisible, as where an additional premium is paid for a license to perform certain acts, which are never performed, and the risk paid for is never incepted, the premium is returnable.[180] Where the ship, for an additional premium, was to go from Teneriffe to the Isle of May and Bonavista, thence to New York, with a contingency that if she should not go to Bonavista, and the risk end safely, one per cent was to be returned, and refusing to perform quarantine, she was not permitted to enter Teneriffe, but went to Madeira, thence to the Isle of May, but did not go to Bonavista, a return of premium was granted, on the ground that the voyage from Teneriffe never commenced.[181]

§ 1422. Return of Premium—Effect of Usage—Review of Authorities.—We have in a former chapter given some consideration to the question of admissibility of usage to effect a written contract,[182] and the conclusions there given will, so far as applicable, govern in cases of the character considered under the last two sections. The court in a Massachusetts case refused to allow a return of the premium where the insurance was on a cargo outward and return, and no homeward cargo was shipped, although there was proof of a usage to allow a proportionate return in such cases; the ground of the decision being that the usage was in opposition to the principles of law, and could not therefore be maintained.[183] This decision must

[178] Waters v. Allen, 5 Hill (N. Y.), 421.

[179] Long v. Allen, 4 Doug. 272, per Lord Mansfield; Tyrie v. Fletcher, Cowp. 666, per Lord Mansfield.

[180] Bunyon on Insurance, 95.

[181] Robertson v. Columbia Ins. Co., 8 Johns. (N. Y.) 491.

[182] See secs. 246-251, herein.

[183] Homer v. Dorr, 10 Mass. 26.

rest upon the fact that the usage was indefinite, or upon the assumption that the law was positively settled in that case; that is, that the words of the contract were so clear and explicit that their construction was well settled by law, which the court was bound to adopt, and that to admit the controlling force of the claimed usage would be in effect to nullify and expunge the plain words of the contract. The rule deduced from Lord Mansfield's opinions is that, although by the terms of the contract the risk may be entire, yet if an express usage is found to apportion the premium in like cases, it shall be apportioned.[184] Mr. Duer also agrees that such is the rule, for he first states the rule as to nonreturn of premium where the risk and premium are entire, and adds: "The usage, however, of a particular trade may create an exception from this last rule, and impose upon the underwriter the duty of returning a whole or a large portion of the premium that the law would have permitted him to retain." [185] So in the case of Stephen-

[184] Long v. Allen, 4 Doug. 276, per Lord Mansfield and Buller, J., reported in 2 Marshall on Insurance, ed. 1810, 660; Stevenson v. Snow, 3 Burr. 1237, opinions of Lord Mansfield and Wilmot, J. See Donath v. North American Ins. Co., 4 Dall. (U. S.) 463, per the court; Gale v. Machell, per Lord Mansfield, reported in 2 Marshall on Insurance, ed. 1810, 659.

[185] This statement of the rule arises in connection with the very point raised in the Massachusetts case above noted, and he considers that case at length and says: "It was proved to be the invariable custom in all the offices in Boston, public and private, to return a portion of the premium on such policies when the vessels returned without any cargo belonging to the assured, and that one-half except one per centum or one-half per centum is returned, unless a greater portion of the risk was applicable to the outward than to the homeward voyage, in which case the sum returned was conformed to the estimated risk. The usage thus proved was liable to insuperable objections. It was indefinite and it was local. It provided no certain rule. The insurer might deduct from the one-half he returned one per cent or one-half per cent, and if he chose to estimate the risks of the outward greater than those of the homeward voyage, the amount to be returned seems to have rested in his sole discretion. So the usage, for aught that appeared, was limited to Boston, and did not extend to the other ports of Massachusetts; and it was justly observed by the counsel for the plaintiff that if a usage was to be admitted at all, it ought to be the usage of a state, and not that of a single port," and although it was not upon these grounds that the decision was placed, but upon the grounds that "usage of no class of

son v. Snow,[186] although a usage was proven to return a part of the premium, the quantum was uncertain, as dependent upon uncertain circumstances, and Lord Mansfield said: "These contracts are to be taken with great latitude. The strict letter is not so much to be regarded as the object and intention of the parties. Equity implies a condition that the insurer shall not receive the price of running a risk if he runs none. . . . . I do not go upon the usage, which is only that in like cases a part of the premium is returned, without ascertaining what part. . . . . The practice shows that it has been usual in such cases to return a part of the premium, though the quantum be not ascertained, and indeed the quantum must vary as circumstances vary. But though the quantum has not been ascertained, yet the principle is agreeable to the general sense of mankind." The case was, however, decided principally upon the ground that the risk and premium were divisible. Mr. Arnould says: "Where no usage is proved to the contrary, an entire premium cannot be divided or apportioned, unless the risks are divided in the policy in such a manner that the parties had distinct risks in contemplation."[187] So also Mr. Parsons declares that "if the premium is entire, the presumption is that it is not to be severed or returned in part, but this presumption may be rebutted either by provisions of the policy indicating a different intention, or by a reasonable usage sufficiently established."[188]

§ **1423. Same Subject—Conclusion.**—It would seem therefore, that if the parties contracted with reference to the usage in question, or if the usage is of the proper kind and character, the rule deduced from the opinions of Lord Mans-

citizens can be sustained in opposition to principles of law," the decision was plainly erroneous, and "is irreconcilable with that of Lord Mansfield in the King's Bench, and in Long v. Allen, 4 Doug. 276, which was not cited or referred to either by counsel or court": 1 Duer on Marine Insurance, ed. 1845, 200, sec. 48, et seq., 246, et seq., 301-7, where the question is fully discussed. But see 2 Phillips on Insurance, 3d ed., 511, et seq., and note 3, p. 513.

[186] 3 Burr. 1237.

[187] 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1232, *1217.

[188] 1 Parsons on Marine Insurance, ed. 1868, 512.

field, as above stated, should govern, unless the words of the contract are so clear and explicit that their construction is well settled by the law, which the court is bound to adopt, and then to admit the controlling force of the claimed usage would be in effect to contradict or vary or nullify and expunge the plain and explicit words of the contract.

§ **1424. Stipulation for Return of Premium—"Sold or Laid up."**—A stipulation for a proportionate return of the premium if the ship be "sold or laid up" necessitates, to warrant a return, such a permanent laying up without employment for the current year as to determine the policy, and not a mere suspension of the risk, the vessel being again employed.[189]

§ **1425. Return of Premium—Retention of a Certain per Centum by the Insurer.**—In many marine policies it is stipulated that in all cases of return of premium, in whole or in part, a certain per cent of the premium is to be retained by the insurers;[190] although it appears from Emerigon to have been usual without a stipulation therefor, and is placed by him on the ground that it is due "for the trouble of having signed," and "not for damages and losses for the nonexecution of the contract by the act of the assured." [191] And it seems to be the custom in England to retain one-half per cent unless the pol-

[189] Hunter v. Wright, 10 Barn. & C. 714; 8 L. J. K. B. 259; 1 Sel. & W. 138.

[190] Under one of the forms in San Francisco ten per cent of the premium is retained.

[191] Emerigon on Insurance, Meredith's ed. 1850, c. xvi, sec. 6, p. 662, et seq. He adds: "This tax for signature is granted them even though the contract should be infected with visceral and legal nullity in case they had known nothing of it. But if they have been informed of the defect, or if they could not have been ignorant of it, they have no claim for the tax for signature as . . . . if they have insured effects the safe arrival of which was already known to them; if they have assured effects of which the importation or exportation is prohibited by the king. . . . . In the case where the insurance is simply migratory, ... or because the insured has shipped nothing, the half per cent is due to the insurers. . . . . The tax for signature is given to the insurers although the voyage be entirely broken up

icy stipulates to the contrary.[192] Where a policy was effected, and when it was signed a memorandum was made that in case insurance had been effected in England, where it had been ordered, it should supersede so much of the insurance as was covered by the policy, and one per cent of the premium should be retained, and the policy was subsequently effected in England, the defendants were held liable for the whole loss.[193]

§ **1426. Return of Premium—Insurance by Voluntary Agent.**—There has been some discussion as to the right of the assurer to retain the premium where the insurance has been effected by a voluntary agent for another. We have, however, already considered the authority of agents to insure in cases where the governing principles are to a large extent applicable here.[194] The general rule would seem to be that a voluntary insurance, the risk having attached, creates a liability for the loss on the part of the insurer, as it is always possible that the person for whom it was intended may ratify the insurance, and in case of loss it is extremely probable that he will do so, and therefore it would be inequitable to say that the insurer shall run the risk of the goods having arrived safely, and that he should be deprived of the premium which he has earned and is justly entitled to retain, and therefore the rule which best accords with the principles of insurance law is that if the voluntary insurance is one which could have been ratified by one entitled to adopt it, and the risk has attached, the insurer shall retain the premium, whether the contract be actually ratified or disclaimed, and there shall be no return or apportionment thereof.[195] Mr. Phillips and Mr. Duer both agree that a rule which is in effect the same as that

before the departure of the ship, even by the act of the assured . . . . or from any other cause, provided the insurer be not guilty of fraud": See 1 Phillips on Insurance, 3d ed., 33, sec. 53; 2 Phillips on Insurance, 3d ed., 520, sec. 839.

[192] 2 Arnould on Marine Insurance, Perkins' ed. 1850, 1252, 1253, sec. 428; 2 Marshall on Insurance, ed. 1810, b. 1, c. v, sec. 4, *676.

[193] Hogan v. Delaware Ins. Co., 1 Wash. (C. C.) 419.

[194] See c. xxii, secs. 669, 927, 944-46, herein.

[195] Finney v. Fairhaven Ins. Co., 5 Met. (Mass.) 192; Routh v. Thompson, 13 East, 289, per Bayley, J.; McCollough v. Royal Exch.

above stated seems to govern, and the latter author declares that such is also the general law of Europe and in England.[196] And while the rule stated by Mr. Parsons accords with that above given, he limits its application, by saying such a doctrine "must be confined to insurances effected for parties in interest who have given some authority or appearance of it to the agent."[197] He relies, however, in support of this limitation only on general principles, and cites no authorities. A New York decision is cited as opposed to the rule above given, but that case decided that where the interest of one is insured by mistake by another, who supposes himself to be an agent, and no risk is run, the principal may recover the premium advanced;[198] and in another New York case it is held that neither a ship's husband, as such, nor part owners, who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them.[199]

§ 1427. Recovery Back of Premium from Agent.—If the insured has paid the premium to the company's agent, and before he has paid over the same or assumed any liability on account thereof the company becomes insolvent, and the insured notifies the agent that he claims the money, and does not rely upon the policy issued to him, which is worthless, he may re-

Assur. Co., 3 Camp. 406; Hagerdon v. Oliverson, 2 M. & S. 485, per Le Blanc and Bayley, JJ.; dissenting opinion of Kent, J. (afterward Chancellor), in Steinbach v. Rhinelander, 3 Johns. Cas. (N. Y.) 269.

[196] 2 Duer on Marine Insurance, ed. 1846, 141, et seq., 174, note 3, where this subject is discussed at length: 2 Phillips on Insurance, 3d ed., 505, et seq., sec. 1827.

[197] 2 Parsons on Marine Insurance, ed. 1868, 510, 511.

[198] Steinbach v. Rhinelander, 3 Johns. Cas. (N. Y.) 269. The dissenting opinion of Kent, J. (afterward chancellor), was based upon the ground that the risk had attached, and for like reasons with those above stated in the rule that the insurer was entitled to retain the premium, and Mr. Duer says of the case itself that it "was made at an early period when the law of insurance was yet imperfectly understood, is not supported by argument or analogy, and is entirely repugnant to the commercial law of Europe": 2 Duer on Marine Insurance, ed. 1846, 144, 175, 176.

[199] Turner v. Burrows, 8 Wend. (N. Y.) 144. Contra, Foster v. United States Ins. Co., 11 Pick. (Mass.) 85.

cover back the premium in a suit against the agent, even though he does not surrender the policy until after suit brought.[200] But if the agent has fully complied with his agreement made with the assured to procure and deliver a policy, and a valid policy is issued, the agent is not responsible in an action to recover back the premium paid, although the policy is rejected by the assured, he not being satisfied with its terms.[201] An insurance agent who issues a policy and takes the premium after the company's certificate of authority to do business in Missouri has been revoked by the superintendent of insurance, is liable to return the premium, although he was not then aware of the revocation, and the statutory notice of revocation has not been given by the superintendent.[202] In another case H. paid an insurance agent a premium of ninety-nine dollars, which was not paid over to the company, and a fire occurring H. compromised, taking two hundred and seventy-four dollars less than the adjusted loss. It was held that the difference could not be recovered from the agent, but that the ninety-nine dollars was evidently not embraced in the settlement.[203]

§ **1428. Who may Recover Back Premium.**—The premium if returnable, is due to the assured, as a general rule, although in case another has paid the premium in good faith, as in case of a beneficiary, the premium being returnable, he may be entitled thereto,[204] and the action need not necessarily be brought by the actual insured, but may be maintained by the nominal party in interest.[205] So it is held that an assignor of the policy before his bankruptcy may sue for the premium in his own name, as trustee for the assignee,[206] and a mortgagee may recover back premiums paid on a policy obtained by him,

[200] Smith v. Binder, 75 Ill. 492.
[201] Leonard v. Washburn, 100 Mass. 251.
[202] McCutcheon v. Rines, 68 Mo. 122.
[203] Haight v. Kremer, 9 Phila. (Pa.) 50.
[204] Frain v. Life Ins. Co., 67 Mich. 527.
[205] Martin v. Sitwell, 1 Show. 156.
[206] Castelli v. Boddington, 1 El. & B. 66; affirmed, Castelli v. Boddington, 1 El. & B. 879.

the policy being void ab initio without his fraud.[207] Creditors are, in certain cases, held entitled to the amount of premiums on an insurance effected by a husband for the benefit of his wife, the premiums having been paid out of moneys held in fraud of creditors. This question, however, goes rather to the point of who is entitled to recover under the policy, where it will be considered.[208]

§ 1429. Return of Premium—Assignment—Right of Assignee.—It is held that if the assured has assigned his policy to another, he may, after his bankruptcy, sue in his own name, as trustee for the assignee, for a return of premium.[209] If an agreement to sign a life policy cannot be consummated, because the beneficiaries do not consent, premiums or assessments paid by the creditor are returnable upon the death of the assured.[210] But where the mortgagor assigns the policy to B, who in turn assigns the same with the mortgage to C, the right to a return of the premium does not therefore pass to C, and if paid to him is held for the use of A.[211] In case of a policy taken out by the mortgagor and assigned to the mortgagee for his protection, the return premium belongs to the mortgagor, even when the equity of redemption has been purchased by another who pays the premiums.[212] This rule, however, is subject to such exceptions as may arise by reason of the circumstances of the case, dependent upon principles already considered.[213] And, in general, in determining the question

[207] Waller v. Northern Assur. Co., 64 Iowa, 101. But see the next section as to the right of a mortgagee to recover premiums paid under a decree. See sec. 1161, herein.

[208] As to the right of a person to recover back premiums paid under a bona fide but mistaken belief of ownership of the policy, see sec. 1148, herein.

[209] Castelli v. Boddington, 1 El. & B. 66; affirmed Castelli v. Boddington, 1 El. & B. 879.

[210] Kentucky Grangers' Mut. B. Soc. v. McGregor, 7 Ky. L. Rep. 750; Hubbard v. Stapp, 32 Ill. App. 541; Gibson v. Kentucky Grangers' Mut. B. Soc., 8 Ky. L. Rep. 520.

[211] Felton v. Brooks, 4 Cush. (Mass.) 203.

[212] Rafsnyder's Appeal, 88 Pa. St. 336; Merrifield v. Baker, 9 Allen (Mass.), 29.

[213] See secs. 1152-61, herein. Examine, also, Parker v. Smith Chartens, 127 Mass. 499.

considered under this section, the circumstances may be such that regard should be had to the validity of the assignment.[214]

§ 1430. Return of Premium—Miscellaneous Authorities. The insured in a mutual fire insurance company is not, because of the fact of membership, entitled to a return of premium.[215] But as a general rule, where one party to a contract under seal refuses, without right, to perform his part, the other party may elect either to sue on the contract to recover damages for the breach, or to rescind the contract and sue in assumpsit to recover back money paid under the contract for which he received no substantial benefit.[216] In case of insurance on the ship and cargo, if the cargo is not put at risk, there shall be a return of premium paid thereon.[217] If the contract has not been completed, as where it does not conform to the proposal of the assured, the premium is returnable.[218] It is held that the company may be obligated to pay the loss, although the beneficiary has received back his assessment, and although the assessment was received and paid to the company when overdue in ignorance by both parties of the fact of death of the assured, it appearing that the agent was accustomed to collect the same, and that the assured was ready and willing to pay it any time when called for, and also that the amount of the assessment was grossly disproportionate in amount to the sum due upon loss under the certificate.[219]

[214] Connecticut Mut. L. Ins. Co. v. Burroughs, 34 Conn. 305; and secs. 590-95, 780, herein.

[215] Friesmith v. Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587.

[216] American L. Ins. Co. v. McAden, 109 Pa. St. 399.

[217] Hornmeyer v. Lushington, 15 East, 46.

[218] Fowler v. Scottish Eq. L. Ins. Co., 28 L. J. Ch. 225. As to allowance of interest in case of return of premium, see Waddington v. United Ins. Co., 17 Johns. (N. Y.) 23.

[219] Mutual Relief Soc. v. Billan, (Cin. Sup. Ct.), 3 Am. L. Rec. 546.

TITLE VII.

ATTACHMENT AND DURATION OF RISK.

(1507)

TITLE VII.

ATTACHMENT AND DURATION OF RISK.

CHAPTER XXXVI.

ATTACHMENT AND DURATION OF RISK.

§ 1436. Attachment and duration of risk—Generally.
§ 1437. Receipt and acceptance of application and fee.
§ 1438. Countersigning policy—Death before.
§ 1439. Attachment and duration of risk: Parol contract.
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§ 1471. Right to reinstatement may pass to beneficiary.
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§ 1473. Suspension of risk.
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§ 1436. Attachment and Duration of Risk.—Generally. As preliminary hereto, it may be stated that the very foundation of the contract of insurance rests upon the principle of nonliability for any loss not occurring during the continuance of the risk. There are certain cases, however, where the insurance is clearly intended to have a retrospective effect, as where the contract is "lost or not lost," although this is rather a qualification of, than an exception to, the rule. The principle that the loss, damage, or injury must be sustained during the continuance of the risk is apparent from the cases under the following chapters as to the attachment and termination of the risk, as well as from other decisions considered in various parts of this work. A question, however, has arisen as to the result, after the termination of the risk, of injuries occurring during the continuance of the risk, which will be noted hereafter.[1] Many questions have been considered under prior chapters relating to the contract of insurance and reinsurance; the completion, requisites, and validity of the same; the effect of usage thereon; the attachment and modification of the same; the effect of war thereon; the payment and nonpayment of premiums, and assessments and insurable interest, and all have a more or less important bearing upon the question of attachment and duration of the risk.[2] As also have the ques-

[1] See sec. 1553, herein.
[2] See chaps. 4-11, 27-33, herein.

tions of alterations, change or increase of risk, the breach of contract for noncompliance with conditions and warranties, or the avoidance of the same for misrepresentations. In brief, risk being an essential part of the contract of insurance, there are very few questions connected with that subject which may not enter into the determination of what constitutes the attachment or duration or termination of the risk. Thus, in unilateral life contracts conditioned for forfeiture for nonpayment of premiums, the assured may of his own volition, no obligation resting upon him to pay the premiums, end the contract by neglecting or refusing to pay the same; although in certain cases noted under the chapter on assessments he may be liable for assessments after he has thus terminated the contract, or so even after a loss. The contract may be terminated by mutual consent of the parties; or the statute may provide for its rescission or cancellation under certain conditions; or the policy may stipulate for a cancellation of the risk; or in case of mutual benefit societies, membership may be terminated by the assured upon certain conditions; or in case of a term policy, the expiration of the term will release the parties; or in case of a policy upon the voyage, the termination of the same under the contract will end the obligations of the parties. So in case of a parol contract for insurance accepted conditionally, it may be finally rejected. The above principles are supported by authorities throughout this work. The duration of the policy may be limited to the payment of the premium, as where the premium is to be paid within fifteen days after the expiration of the time of insurance; in such case it merely vests a right of insurance within that time, if the insurer agrees to the same.[3] And the policy may never attach, as where the warranty of seaworthiness is not satisfied.[4] Where the policy provides that it shall cover such risks as may be approved and indorsed thereon, such requirement is sufficiently com-

[3] Tarleton v. Staineforth, 5 Term. Rep. 695; 1 Bos. & P. 471.

[4] Hoxsie v. Pacific Mut. Ins. Co., 7 Allen (Mass.), 211; Barnewell v. Church, 1 Caines (N. Y.), 217; Dudgeon v. Pembroke, 1 Q. B. D. Ex. Ch. 96. See American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 533; 20 Wend. (N. Y.) 287.

plied with by an entry of such approval of risks in a book furnished the assured therefor, especially where such approval and indorsement are frequently made and written opposite a description of the risk.[5]

§ **1437. "Receipt and Acceptance" of Application and Fee.**—If the application, which is expressly made a part of the policy, provides that there shall be no liability on the part of the company prior to the "receipt and acceptance" of the application and membership fee, the contract does not take effect until after acceptance.[6] This rule would, however, be subject to such exceptions as would arise in case of waiver and estoppel.

§ **1438. Countersigning Policy—Death Before.**—Where an application for a mutual life policy provided that the company would not be liable until the application and membership fees were received by the secretary of the company, and the policy provided that there should be no liability until the membership fee and premium had been received by the company, and the policy countersigned by an agent of the company, it was held that the fact that the application, membership fee, and premium had been received by a solicitor of the company did not cause the risk to attach so as to render the company liable for the death of the applicant two days before the policy was countersigned and the fee and premium received by the agent.[7]

§ **1439. Attachment and Duration of Risk—Parol Contract.**—We have seen that the contract need not be in writing, in the absence of a statutory requirement therefor, so that the risk may attach under a parol contract, whether it be completed or be an agreement for a policy, unless the risk is

[5] Heilner v. China Mut. Ins. Co., 45 N. Y. St. Rep. 578; 18 N. Y. Supp. 177.

[6] Coker v. Atlas Accident Co. (Texas C. C. A. 1895), 31 S. W. Rep. 703.

[7] Newcomb v. Provident Fund Soc., 5 Colo. App. 140; 38 Pac. Rep. 61.

taken subject to approval or final rejection,[8] even though, in case of an agreement for insurance the policy be not executed or delivered until after the loss.[9] So a valid parol agreement, made in October, that a policy for twelve months should be issued in the early part of November will cover a loss occurring during the middle of November.[10] And where the contract is made subject to approval, the risk terminates when notice of the company's disapproval is given.[11] So if the contract provides that the risk shall attach on a date earlier than that of the policy, the company will be liable, there being no fraud or concealment on the part of the assured for a loss occurring subsequently to the date fixed, and before the policy is executed and delivered.[12] If the terms of insurance are settled between the assured and an agent of the company having real or apparent authority to bind the company in this respect, and an agreement is made to issue a policy to take effect from the date of the agreement, the contract is binding.[13] So the risk may be continued by renewal of the contract by parol.[14]

§ 1440. Necessity of Fixing Duration of the Risk.—The contract may stipulate that the risk may end at either party's election,[15] or the statute may provide for rescission or cancellation on certain conditions. But the rule nevertheless obtains that it is important to know exactly when the risk begins and terminates; that is, the period during which the insurance is to continue should be certain or capable of ascertainment, either from the policy itself or by reference to extrinsic matters, when evidence thereof is admissible.[16] So the

[8] See "parol contracts," chaps. iii and iv, herein, and secs. 44, 72, 103, 104, 119, 120, herein.

[9] City of Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276.

[10] Home Ins. Co. v. Adler, 71 Ala. 516.

[11] Goodfellow v. Times Assur. Co., 17 U. C. 411.

[12] Commercial Ins. Co. v. Hallock, 27 N. J. L. (3 Dutch.) 645.

[13] North British & M. Ins. Co. v. Taubert, 26 Or. 199; 37 Pac. Rep. 909.

[14] Section 41, herein.

[15] Sullivan v. Massachusetts Mut. Ins. Co., 2 Mass. 318.

[16] See Cleveland v. Union Ins. Co., 8 Mass. 308; Strohn v. Hartford Ins. Co., 37 Wis. 625; 19 Am. Rep. 77; Cal. Civ. Code, sec. 2587.

termination of the risk may depend upon some event stipulated in the policy, as in case of death in a life risk, or the arrival at a certain port in a voyage, or mixed policy. In marine risks, insurances are divided with reference, 1. To the time; as where the risk begins and terminates on certain days, without regard to the actual situation of the ship; 2. The voyage; the places of beginning and ending, or the terminus a quo and terminus ad quem of the risk, being described or defined and ascertainable; 3. To both the voyage and time; the beginning and end of the risk depending upon the time specified, the risks relating to a certain voyage.[17] Or the attachment and duration of the risk may be dependent upon a specified event; as by the words "at," "at and from," or "from" in the policy.[18] So it is held that the policy may be determined by the determination of the specified event, even though the insurance be by a time policy; as in case of insurance upon a building while the insured was drying hops, where the risk was held not to extend beyond the time the insured ceased drying hops.[19] So insurance on a vessel may be effected on time, and with reference to the situation of the vessel at the end of the period fixed; as in case of a policy for a year, and if the ship be on a passage or at sea at the end of the period, the risk to continue until her arrival at her port of destination.[20] And in all cases a description of the risk must have reference as to its duration, to time, place, or both, or to some event specified or ascertainable from the contract.[21] The insurance may be on time, or on a particular voyage, or to several ports named, or a general voyage within a certain range described by general words. It may be a voyage to a single port, or to ports in the alternative, or the character of the voy-

[17] See secs. 170-175, herein.

[18] Patrick v. Ludlow, 36 Johns. Cas. (N. Y.) 14; Palmer v. Marshall, 8 Bing. 79; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283; Parmeter v. Cousins, 2 Camp. 235; Lorring v. Seamen, 1 Mason (C. C.), 139.

[19] Langworthy v. Oswego Ins. Co., 85 N. Y. 632.

[20] See Code v. Union M. Ins. Co., 12 Gray (Mass.), 501; Washington Ins. Co. v. White, 103 Mass. 238.

[21] 1 Phillips on Insurance, 3d ed., p. 29, sec. 37; Barber on Insurance, 71, sec. 48.

age may be such that the several ports should be visited in their geographical order, or in the order named in the policy or the order observed by custom. Again, the description may exclude certain ports, or include liberty to touch and stay at certain ports. The insurance on a particular voyage generally contains no reference to time, and if the insurance on such particular voyage be one not on time, the commencement and termination of the voyage must be expressed in the policy by the termini.[22] And these should not be left in any uncertainty by any omission or blank, either of the ship's departure or destination. If the insurance is by a time policy, the termini are the day and hour when the insurance commences and ends;[23] yet if the termini or the commencement and termination of the risk in insurances not on time, but voyage policies be not clearly or exactly stated, nevertheless if they are capable of being made certain from the contract, and evidence of such circumstances as are admissible, the policy will be valid; as where the vessel was at a certain port on the day of the execution of the policy, and the cargo was there loaded according to contract, etc.[24] So the policy will be valid where the termini are fixed, although the time of final arrival at the return port of the voyage is indefinite, as in a voyage from a certain port backward and forward, etc., until the ship's return to the United States.[25] But under a policy "at and from" to commence on a specified day, without information being given or asked as to the place where the ship then is, it will be implied that the risk is to commence within a reasonable time, in the absence of some express provision concerning the same, and if the vessel does not arrive until

[22] Cleveland v. Union Ins. Co., 8 Mass. 308.

[23] Grousset v. Sea Ins. Co., 24 Wend. (N. Y.) 209, per the court; Cleveland v. Union Ins. Co., 8 Mass. 308; Manly v. United M. & F. Ins. Co., 9 Mass. 88, per Sewall, J.; 1 Marshall on Insurance, ed. 1810, 321.

[24] Folsom v. Merchants' Mut. M. Ins. Co., 38 Me. 414. See Petrie v. Phœnix Ins. Co., 132 N. Y. 137; 30 N. E. Rep. 380; 43 N. Y. St. Rep. 478; 21 Ins. L. J. 551; affirming 32 N. Y. St. Rep. 965; 11 N. Y. Supp. 188. But see Molloy's De Jure Maritimo, b. 2, c. vii, sec. 14, as to omission of terminus ad quem.

[25] Cleveland v. Union Ins. Co., 8 Mass. 308.

forty-seven days after the policy is effected, the insurers will be discharged.[26] In a policy on a cargo in the West India trade to "Barbadoes and a market," the ship may, in good faith, sail from island to island until a disposition is made of the whole cargo.[27] If the voyage described is not the voyage intended, the risk will not attach.[28] Although it is necessary, in order to render a contract to insure binding, that the subject matter, period, rate, and amount of insurance should have been agreed upon, yet the mere fact that the parties have had previous dealings does not show an adoption of the provisions of those dealings without a reference to them in the contract.[29]

§ 1441. Attachment and Duration of Risk—Date of Contract.—Although the contract of insurance is deemed to have been made at the date of the policy, and to take effect therefrom, unless a different day is specified therein, or it is apparent from the construction of the contract that another day was intended,[30] yet a policy is not invalid because it has no written date,[31] and if a verbal contract to issue a policy is made with an authorized agent of the company, and no date is mentioned from which the insurance is to take effect, the risk will commence immediately.[32] Nor is the date conclusive of the time of actual subscription,[33] it being only prima facie evidence of its true date.[34] So although a policy is by its terms to take effect at a certain time, yet it may be shown that, from want of delivery, failure to comply with some condition precedent,

[26] De Wolf v. Archangel Maritime B. & Ins. Co., 9 L. R. Q. B. 451; 43 L. J. Q. B. 147.

[27] Maxwell v. Robinson, 1 Johns. (N. Y.) 333.

[28] See sec. 1488, herein, and c. iii, as to deviation.

[29] Commercial F. Ins. Co. v. Morris, (Ala. 1895), 18 S. Rep. 34.

[30] Day v. Hawkeye Ins. Co., 72 Iowa, 597; 34 N. W. Rep. 435; Lightbody v. North American Ins. Co., 23 Wend. (N. Y.) 18; Ruse v. Mutual B. L. Ins. Co., 23 N. Y. 516; Philadelphia L. Ins. Co. v. American L. Ins. Co., 23 Pa. St. 65; Keim v. Home Mut. F. & M. Ins. Co., 42 Mo. 38.

[31] Lee v. Massachusetts Ins. Co., 6 Mass. 208.

[32] Potter v. Phœnix Ins. Co., 63 Fed. Rep. 382.

[33] Earl v. Shaw, 1 Johns. Cas. (N. Y.) 314; 1 Am. Dec. 117. And see cases under first note in this section.

[34] Lorent v. South Carolina Ins. Co., 1 Nott. & McC. (S. C.) 505.

or other cause, it did not take effect, until a subsequent time or on a different date.[35] And as a policy is presumed to attach from the day of its date; the risk may attach before the delivery of the policy, as where it is not delivered until several days thereafter.[36] So although a policy provides for insurance of property from a time anterior to its date, if it appears expressly from the application that no liability will attach until the same is approved, and it is approved on the day the policy is dated, it takes effect from the day of date.[37] So the surrender of a policy to take effect from a certain date releases the insurer, without regard to the time of his actual discharge by the company.[38] If the acceptance is conditional upon the payment of the premium, and it is paid, the risk attaches by relation from the day of date of the policy, but it does not attach if the premium is not paid as agreed,[39] unless there has been a waiver or the circumstances raise an estoppel.[40] And when the date of the commencement of the risk is by indorsement made on the policy, whereby the date of the policy is in effect changed to the date of delivery, the latter date is that of the commencement of the risk, the policy being at that time delivered and the premium then paid.[41] If a policy is dated and delivered on Monday, the fact that on Sunday the agents of the company examined the property and

[35] Hall v. Cazanove, 4 East, 477; Atlantic Ins. Co. v. Goodall, 35 N. H. 328; Jackson v. Bard, 4 Johns. (N. Y.) 230.

[36] Lightbody v. North American Ins. Co., 23 Wend. (N. Y.) 18; American Horse Ins. Co. v. Paterson, 28 Ind. 17; Kentucky Ins. Co. v. Jenks, 5 Ind. 96. See Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325; 11 Am. Rep. 125.

[37] Day v. Hawkeye Ins. Co., 72 Iowa, 597; 34 N. W. Rep. 435. See Ætna Ins. Co. v. Webster, 6 Wall. (U. S.) 129; Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[38] Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[39] Walker v. Metropolitan Ins. Co., 56 Me. 371; Hubbard v. Hartford Ins. Co., 33 Iowa, 325; 1 Am. Rep. 125; Home Ins. Co. v. Field, 42 Ill. App. 392; 24 Chi. Leg. News, 122; Ruse v. Mutual B. Ins. Co., 23 N. Y. (9 Smith) 516.

[40] See c. iv, herein.

[41] Gloucester Mfg. Co. v. Howard F. Ins. Co., 5 Gray (Mass.), 497. See Bruton v. Metropolitan L. Ins. Co., 48 Hun (N. Y.), 204.

agreed with the insured as to the amount of insurance does not render it a Sunday contract.[42]

§ **1442. Attachment and Duration of Risk—The Date—Reinsurance.**—A contract of reinsurance may be referred, with relation to its attachment and duration, to the date of the original insurance,[43] or it may limit the risks to those existing at a specified date,[44] and parol evidence is admissible to show that a reinsurance was intended to and does cover the whole period of the original insurance.[45]

§ **1443. Attachment and Duration of Risk—Insurance Retroactive**—As stated elsewhere, risk is an essential element of the contract, and until the risk commences the insurance does not attach.[46] But an insurance may be retroactive and attach, so as to cover a loss happening before the date of the policy. This is so in cases of an insurance "lost or not lost" in marine risks, although the words "lost or not lost" are not necessary. So also in cases of fire risks, where the thing is distant and its status unknown to either party, such intent that the risk attach may appear from the policy or it may be implied from the circumstances or appear by extrinsic evidence.[47] But a policy made out and delivered to the company's agent, to take effect provided the premium is paid, will not relate back and cover a loss occurring between its date and the time the premium is actually paid, even though the insured when he pays the premium and the agent when he receives it know nothing of the fact of loss.[48] This rule is sub-

[42] Wooliver v. Boylston Ins. Co. (Mich. 1895), 62 N. W. Rep. 149.

[43] Section 120, herein.

[44] Section 122, herein.

[45] Philadelphia L. Ins. Co. v. American L. Ins. Co., 23 Pa. St. 65.

[46] Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346.

[47] Security etc. Ins. Co. v. Kentucky etc. Ins. Co., 7 Bush (Ky.), 81; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Clement v. Phœnix Ins. Co., 6 Blatchf. (U. S.) 481; Sutherland v. Pratt, 11 Mees. & W. 296; Merchants' Ins. Co. v. Page, 60 Ill. 448; Mead v. Davidson, 3 Ad. & E. 303. See secs. 105-7, herein.

[48] Home Ins. Co. v. Field (Ill. App. 1891), 24 Chi. Leg. News, 122.

ject, however, to such exceptions as may arise in cases of waiver and estoppel as to the condition requiring prepayment of the premium.[49] But the mere antedating of the policy by an agent "to make the insurance continuous" does not cause it to relate back, and make the risk attach from the time of leaving a memorandum at the agent's office for a certain amount of insurance on certain property, such memorandum of itself not being a commencement of the risk.[50]

§ **1444. Attachment of Risk—Time Policy may be Retroactive.**—A time policy may be retroactive as to the time of its attachment; that is, to commence on a certain day anterior to the date of effecting the insurance; as where a risk is for a term on a ship "lost or not lost." [51] So the risks may attach, although the words "lost or not lost" are not used, such being the intent of the parties; as where the policy was to commence January 1, 1869, and to continue until January 1, 1870, and the policy was effected March 1, 1869, a previous loss was held covered, such being the intent of the parties,[52] and if after the risk is offered and accepted, and before the policy is formally executed, the loss is known to both parties, the policy will be valid.[53]

§ **1445. Risk may Attach although Mistake in Description of Property.**—If both parties have in view the same vessel, and the underwriter when the policy is issued knows its true name, and it is intended to insure that particular ship, a mistake in the name of the vessel will not prevent a recovery for its loss, there being no fraud or concealment, and the contract being otherwise valid and complete; but the risk will not attach where the mistake is as to the vessel itself, and

[49] See c. iv, herein.

[50] Wales v. New York Bowery F. Ins. Co., 37 Minn. 106; 33 N. W. Rep. 322.

[51] Mead v. Davidson, 3 Ad. & E. 303; 4 L. J. K. B., N. S., 193; Hocks v. Thornton, Holt N. P. 30. See secs. 105-7, herein.

[52] Insurance Co. v. Folsom, 18 Wall. (U. S.) 237; affirming 9 Blatchf. (C. C.) 201; 8 Blatchf. (C. C.) 190.

[53] Mead v. Davidson, 3 Ad. & E. 303; 4 L. J. K. B., N. S., 193.

the policy is upon another vessel than that for which the application is made, for in such case there is not that meeting of minds necessary to complete the contract.[54]

§ 1446. Attachment and Duration of Risk—Computation of Time.—In the absence of a stipulation otherwise in the policy, the day of the commencement and termination of the risk specified therein doubtless begins and ends at midnight.[55] Ordinarily, the contract is complete from the date of its acceptance by the company. Thus, where an application was dated September 11th for one year from September 12th, and the agent referred the risk to the company, which accepted it on the 19th, and on the 22d the agent sent a policy to the insured bearing date of the 22d, it was held that the company was liable for a loss occurring on the 21st, for the contract was completed on the 19th.[56] But where a bond given for the fidelity of an employee recited that it was for a term of one year, from July 1, 1891, to July 1, 1892, and there was an indorsement on the back of the bond to the same effect, but the bond was dated July 10th, it was held that it was properly construed as taking effect from July 1, 1891, without regard to evidence as to when it was accepted.[57] In determining the duration of a risk under a time policy commencing on a certain day at noon for one year, the rights of the parties must be governed by the meridian of the place where the contract is made, no other place being specified.[58] The question whether a policy "from" a certain day takes effect on that day, or whether that should be excluded or included, has been considered in a prior part of this work, and, as is there stated, the question is unsettled, although in cases of notices of the times when assessments are due and payable,

[54] Hughes v. Mercantile Mut. Ins. Co., 55 N. Y. 265; 14 Am. Rep. 254.

[55] See Och v. Homestead etc. Ins. Co., 21 Pitts. L. J. 98; Isaacs v. Royal Ins. Co., 5 L. R. Ex. 296; 39 L. J. Ex. 189.

[56] Hartford F. Ins. Co. v. King (Ala. 1895), 17 S. Rep. 707.

[57] Supreme Council v. Fidelity & Casualty Co., 63 Fed. Rep. 48; 39 Cent. L. J. 444; 50 Alb. L. J. 363.

[58] Walker v. Protection Ins. Co., 29 Me. 317; Schofield v. Jones, 2 Ins. L. J. (Eng.) 640 b.

and in other contracts of insurance, especially those relating to the time when the statute of limitations commences to run, the decisions favor a rule of exclusion.[59] The rule of exclusion of the day cannot, however, apply where it is clearly the intention of the parties that the contract should attach at the date of the policy, or where the risk is to commence "on" a certain day. In the latter case the policy attaches on the day specified, and extends to all parts thereof.[60] If insurances are issued on the same day or are concurrent insurances, parts of the day may be considered in determining their privity of attachment.[61]

§ 1447. Attachment of Risk—Goods Shipped "between" Two Dates.—A policy of insurance on goods to be shipped "between" two certain days does not attach on goods shipped on either of those days, for both days are excluded.[62]

§ 1448. Attachment and Termination of Risk—Necessity of an Insurable Interest.—We have seen that a policy on property wherein the insured has no interest or title is void,[63] and it would necessarily follow that the risk cannot attach unless or until there be an insurable interest in the property.[64] But if a policy is otherwise valid, it attaches to whatever insurable interest the assured has, whether as owner or otherwise.[65] If one on whose account the policy is made is interested in the ship, but not in the voyage, it is held that he cannot recover damages for the loss of the voyage.[66] So the risk may be determined by the insurable interest being di-

[59] See sec. 170, herein.

[60] 1 Phillips on Insurance, 3d ed., 500, sec. 921; American Horse Ins. Co. v. Patterson, 28 Ind. 17.

[61] Potter v. Marine Ins. Co., 2 Mason (C. C.), 475. See sec. 171, herein.

[62] Atkins v. Boylston F. & M. Ins. Co., 5 Met. (Mass.) 439.

[63] Sec. 889, herein. See, also, chaps. xxvi and xxxv, herein.

[64] Seamans v. Loring, 1 Mason (C. C.), 127. See, also, Steinbach v. Rhinelander, 3 Johns. Cas. (N. Y.) 269; Marsh v. Robinson, 4 Esp. 98.

[65] Riggs v. Commercial M. Ins. Co., 125 N. Y. 7; 21 Am. St. Rep. 716.

[66] Pole v. Fitzgerald, 4 Brown Parl. C. 439; affirming Willes, 641.

vested without the assurer's consent,[67] except in case of a life policy originally valid,[68] and a lack of interest at the time the policy is made is not covered by an interest acquired subsequently.[69]

§ 1449. Termination by Change of Risk—Breach of Conditions.—If after the policy is effected there is a material change in the nature of the risk, or there be no material increase of the same, contrary to the terms of the contract, the risk may be thereby terminated.[70] So also in case of a breach of warranty;[71] or if the conditions of the policy, as in case of a neglect or refusal to pay premium or assessments when due as stipulated;[72] or the policy may be terminated by a prohibited use or occupation of the property.[73]

[67] McDonald v. Administrator of Black, 20 Ohio, 185, 192; Knox v. Wood, 1 Camp. 543; Reed v. Mutual Safety Ins. Co., 3 Sand. (N. Y.) 54; Davis v. Home Ins. Co., 24 U. C. Q. B. 364; Fogg v. Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 337; Pike v. Merchants' Mut. Ins. Co., 26 La. Ann. 505; Wilson v. Royal Exch. Assur. Co., 2 Camp. 623; Bailey v. Ætna Ins. Co., 10 Allen (Mass.), 286. See, also, secs. 901, 903, herein, and c. 1, herein, as to alienation, etc.

[68] Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 461-63. See secs. 901, 903, herein.

[69] Seamans v. Loring, 1 Mason (C. C.), 127.

[70] Murdock v. Chenango Co. Ins. Co., 3 N. Y. 210; Allen v. Massasoit Ins. Co., 99 Mass. 160; Dodge Co. Mut. Ins. Co. v. Rogers, 12 Wis. 337; Kern v. South St. Louis Mut. Ins. Co., 40 Mo. 19.

[71] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673; Kemp v. Good Templars Mut. B. Assn., 19 N. Y. Supp. 435; 64 Hun (N. Y.), 637; Lawrence v. St. Marks etc. Ins. Co., 43 Barb. (N. Y.) 479; Ripley v. Ætna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362; Coicochea v. Louisiana Ins. Co., 6 Martin N. S. (La.) 51; 17 Am. Dec. 175; Ballantyne v. Mutual L. Ins. Co. (1891), 25 Ir. L. T. & L. J. 538.

[72] See chap. xxix-xxxii, herein.

[73] United States F. & M. Ins. Co. v. Kimberly, 34 Md. 224. See, also, subsequent parts of this work as to loss, warranties, and breach of conditions generally. "Forfeitures being odious to courts are never enforced except where they are definitely contracted for and nothing done by the party for whose benefit they are made to mislead the other to his injury": United States L. Ins. Co. v. Ross, 159 Ill. 476, 486, per Wilkin, J. "Forfeitures are not favored in law; they are often the means of great oppression and injustice, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being

§ 1450. Policy may Terminate by its Own Limitation or by Actual Loss or Death.—The policy may terminate by expiration of the time limitation therein, as in case of a policy for a specified term, or where it extends to noon of a day specified or to a day named,[74] although in cases of life contracts conditioned for annual payments on certain days, the question has arisen whether the contract is one from year to year or an entire contract;[75] and there are also exceptions, as where the last day of payment of an annual premium falls on Sunday,[76] or there may be no provision for forfeiture in case of nonpayment of annual premiums in life policies when due.[77] The risk may terminate by a total loss, or by a death actually occurring within the terms and time limit of the policy.[78] But if an accident insurance company's liability becomes fixed at the time of the accident, it is not released by the fact that the insured thereafter, and before his death, ceased to be a member by reason of nonpayment of assessments.[79]

§ 1451. Where Attachment of Risk not Postponed by Condition as to Repair of Vessel.—The attachment of the risk is not postponed, as to perils specified in the policy other than those of navigation, by a condition in the policy that prior damages be repaired, where making the repairs a condition precedent would, owing to the shortness of time, so far postpone the attaching of the policy as to make the insurance substantially valueless.[80]

§ 1452. Attachment of Risk—De Facto and De Jure Existence of Corporation—Compliance with Statutory Requirements as to Organization, etc.—Whether the risk attaches prior to the de facto existence of the corporation, or

made": Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, per Bradley, J.

[74] See secs. 1440, 1441, 1446, herein.

[75] See secs. 1101, 1102, herein.

[76] See sec. 1129, herein, and c. 30, herein.

[77] Section 1098, herein.

[78] See chaps. lviii-ixv, herein, on the loss, secs. 116-21, herein.

[79] Burkheiser v. Mutual Acc. Assn., 10 U. S. C. C. A. 94; 61 Fed. Rep. 816. See chapter on assessments herein.

[80] Hyde v. Mississippi M. F. Ins. Co., 10 La. 543; 29 Am. Dec. 465.

prior to compliance with statutory requirements as to organization of the company, must depend largely upon the grant of corporate power under the charter, as well as upon the fact whether corporate powers may be exercised as soon as the charter is accepted, or not until after the performance of certain requirements or conditions precedent; or in case of organization under general incorporation laws by domestic corporations, or the transacting of business by a corporation in a foreign state, the question depends upon whether the conditions imposed by statute as conditions precedent must be fully or only substantially complied with. In the case of domestic corporations, the question whether the grantees of a charter are competent to carry on business as a corporation must differ from those cases wherein the question is whether the corporation of one state, which is already fully organized, can carry on business in a foreign state. There is also a distinction between compliance with conditions necessary to be complied with to join the corporation, and compliance with conditions precedent to carrying on business after the corporation has been formed, or after it has accepted its charter.[81] Thus, it is held that

[81] For an exhaustive consideration of the points and distinctions here noted, see 1 Morawetz on Private Corporations, 2d ed., secs. 26-32; 2 Morawetz on Private Corporations, 2d ed., secs. 661-65. As to de facto corporations generally, see, also, the note to 19 Am. Dec. 67. As to mutual benefit societies, see Independent Ord. Mut. Aid Soc. v. Paine, 122 Ill. 625; 23 Ill. App. 171 (in this case the lodge was held estopped to deny that it was properly organized); Foster v. Pray, 35 Minn. 458; 29 N. W. Rep. 155. The syllabus in this case reads: "Articles of incorporation of a 'mutual benefit association,' apparently intended as a sort of mutual insurance company, were duly executed by defendants and duly recorded with the register of deeds and secretary of state. M. became a member of the association, paid his dues, and received a certificate of membership, and sustained bodily injury, entitling him as such member to pecuniary benefit, to recover which this action is brought against the original signers of the articles of association as individual members. The association did not become a corporation de jure, not having complied with the statute so as to become an insurance corporation de jure, and not being a 'benevolent society' under Gen. Stats. 1878, c. 34, tit. 3. It was held that although not a corporation de jure, the association is, as between its members, to be regarded and treated as a corporation de facto, and hence this action against the defendants as individual persons will not lie." The court cites Morawetz on Private Corporations, secs.

the risk will not attach so as to bind the company for a loss occurring prior to the giving of the final certificate of the condition, on the ground that the company has before that time no power to contract.[82] But it is likewise decided that preliminary contracts authorized to be entered into by the company may becomevalid on completion of its organization.[83] So it is also decided that a mutual benefit society, by accepting and retaining fees of an applicant, waives all irregularity in the organization of the subordinate lodge and of the applicant's admission to membership.[84] Inasmuch, however, as we have already considered the question of legislation concerning insurance companies, as well as the question of contracts by de facto and de jure corporations, so far as applicable to insurance companies, and also the validity of contracts entered into by insurance companies who have not complied with statutory requirements relative to doing business, we will refer the reader to those sections.[85] The question, however, has

131, 132, 134-37; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; followed in 57, 64, 67 N. Y. and 95 U. S.; White v. Ross, 4 Abb. Dec. (N. Y.) 589; Aspinwall v. Sacchi, 57 N. Y. 331; Eaton v. Aspinwall, 19 N. Y. 119; Sands v. Hill, 46 Barb. (N. Y.) 651; Sanger v. Upton, 91 U. S. 56; Chubb v. Upton, 95 U. S. 665. As to "irregular and de facto corporations" in general, see 1 Thompson's Commentaries on Corporations, 1st ed., c. xi, secs. 495-528. And see section 501 as to validity of corporate existence not litigated collaterally; section 502, limitations of this doctrine; section 503, what is meant by existing de facto; section 504, rule under California Civil Code; section 505, rule applied only where the corporation might exist; section 507, validates irregularities in organization; section 508, except where the thing to be done is a condition precedent; section 518, obligor in contract with corporation estopped to deny corporate existence; section 519, illustrations of the rule; section 520, various statements of this rule; section 521, corporate existence proved by showing that the objecting party has dealt with it as such; section 522, rule restrained to cases of de facto corporations; section 523, this estoppel is not raised where there is no law authorizing the corporation; section 527, party claiming under legislation creating a corporation estopped to deny its existence: 1 Thompson's Commentaries on Corporations, 1st ed., pp. 361-65, 368-370, 377-84, 386.

[82] Manufacturers' etc. Mut. Ins. Co. v. Gent, 13 Bradw. (Ill.) 308.

[83] Section 333, herein, and cases noted.

[84] Perrine v. Grand Lodge A. O. U. W., 48 Minn. 82; 50 N. W. Rep. 1022; 21 Ins. L. J. 213.

[85] Sections 327-33, herein. For authorities and a full consideration of the points and distinctions first noted under this section, see 1

been much discussed as to whether an intended corporation not legally formed is a partnership, and the stockholders liable as partners, although the weight of authority and opinion seems to be that they are not.[86]

§ **1453. Duration of Risk — Expiration of Charter during Life of Policy.**—The policy and a premium note, therefore, are not void because they extend beyond the time limited for the existence of the insurance company,[87] and if the company's charter expires during the term of a policy, the

Morawetz on Private Corporations, 2d ed., secs. 26-32; 2 Morawetz on Private Corporations, 2d ed., secs. 661-65. As to powers of insurance corporations generally, see 5 Thompson's Commentaries on Corporations, 1st ed., c. cxxix, secs. 5849-61; and section 5860, what policies may and may not be issued; sec. 5861, validity of policies issued by foreign insurance companies; 5 Thompson's Commentaries on Corporations, 1st ed., pp. 4533, 4534. And see, also, as to state laws, etc., 6 Thompson's Commentaries on Corporations, 1st ed., secs. 7936-41, 7950, 7956, et seq.

[86] Parsons on Partnership, 4th ed., sec. 57; 2 Morawetz on Private Corporations, 2d ed., sec. 748. But see Holbrook v. St. Paul F. etc. Co., 25 Minn. 229.

[87] Huntley v. Merrill, 32 Barb. (N. Y.) 626. This case is noted in 5 Thompson's Commentaries on Corporations, 1st ed., sec. 5860, p. 4533, and he says: "The propriety of this conclusion would seem to appear from the consideration that in case the legislature should renew the charter, or in case the incorporators should under an enabling act become reincorporated, the obligation would continue in the renewed corporation": adding in a note: "Such was the reasoning of Marvin, J.," in Huntley v. Beecher, 30 Barb. (N. Y.) 580. The same writer, in section 6651, page 5254, says: "If the charter or governing statute of the corporation fixes a definite period of time at which the corporate life shall expire, when that period is reached the corporation is ipso facto dissolved. . . . . Whatever remedies thereafter [after termination of corporate existence] exist, in respect to its assets, for the purpose of calling them in and of distributing them among those entitled thereto, must be supplied either by the statute law or by the remedial principles of equity": See, also, 5 Thompson's Commentaries on Corporations, 1st ed., secs. 6720, 6721, pp. 5305-7; and Id., sec. 6730, p. 5315, where it is said: "The doctrine of the common law stated in the preceding sections, that the debts of corporations and the remedies furnished by that law for the collection of the same die and abate with the corporation, has been generally repudiated by the American courts as odious to justice." See 5 Thompson's Commentaries on Corporations, 1st ed., sec. 6743, as to effect upon executory contracts.

policy is nevertheless valid for the term during which the charter actually exists.[88]

§ 1454. Attachment and Determination of Risk—Insolvency—Dissolution.—It is held that the fact of insolvency of the company does not of itself make the policy void.[89] But the appointment of a receiver operates as a cancellation of the policy, and the contract of insurance is terminated, as to liability for future losses, by the insolvency and dissolution of the company, or after injunction or sequestration. There is, in such case, a damage to the policy holder to the value of the policy at the time of dissolution;[90] or in case of death under life contracts after insolvency, but before presentment of proofs, to the full value of the policy,[91] although it is held in a fire insurance case that the rights of the policy-holder are fixed from the date of a voluntary assignment.[92] If, under the general statutes of Minnesota,[93] a mutual endowment association, the policies of which are to be paid from a fund raised by assessments, is dissolved, immatured policies cease to mature from that date, and the holders of such policies can only share as members of the association in its assets after its

[88] Huntley v. Beecher, 30 Barb. (N. Y.) 580. Mr. Morawetz says a corporation may exist de facto and not de jure after its franchise has expired or has been extinguished, or it may be dissolved de facto before its legal right has expired and before it is dissolved de jure, and where the period of existence of a corporation is definitely fixed by charter, the corporation will cease to exist de facto and de jure upon the expiration of the time: 2 Morawetz on Private Corporations, 2d ed., secs. 1002, 1003.

[89] Ewing v. Coffman, 12 Lea (Tenn.). 79.

[90] Reliance Lumber Co. v. Brown, 4 Ind. App. 92; 30 N. W. Rep. 625; Commonwealth v. Massachusetts Ins. Co., 119 Mass. 51; Muller's Appeal, 35 Pa. St. 481; Commonwealth v. Massachusetts Mut. Ins. Co., 112 Mass. 116; Mayer v. Attorney General, 23 Alb. L. J. 98; Dean's Appeal, 98 Pa. St. 101. In the same rule as to benefit societies, see Stanum v. Northwestern Mut. B. Assn., 65 Mich. 317; 32 N. W. Rep. 710. See further as to insolvency, Chicago L. Ins. Co. v. Medles, 113 U. S. 574; Rinn v. Ator F. Ins. Co., 59 N. Y. 143. See secs. 1272, 1273, herein.

[91] People v. Security L. Ins. Co., 78 N. Y. 114.

[92] Miller's Appeal, 35 Pa. St. 481.

[93] Gen. Stats. 1878, c. 34, sec. 415.

liabilities are discharged.[94] The questions, however, of the rights of the policy holders in such cases will be considered hereafter.

§ **1455. Dissolution—Reserve Fund.**—In a case which arose in New York assessments were to be applied to create a "reserve fund" and a "mortuary and benefit fund." The "mortuary and benefit" fund was for the payment of death claims, but under the by-laws of the association the "reserve" fund was to be for the exclusive use and benefit of the members of the association, with the exception that such fund might be used in the payment of death claims, when such claims were in excess of the experience table of mortality. The by-laws also provided that this reserve fund should, when it reached a certain sum, be divided among the members, or applied to death claims, "as may be determined by a vote of the members." Upon a dissolution of the company it was held that the reserve fund was to be distributed exclusively among holders of certificates in force, and that death claimants had no right to any share therein.[95]

§ **1456. Termination of Contract by Expulsion of Member of Mutual Benefit Society.**—The right to future benefits of a member of a mutual benefit society or organization doing what is substantially an insurance business may be terminated by his legal expulsion for a sufficient cause, as in case of his expulsion from a local and subordinate order of a society conducted on the lodge system and doing an insurance business.[96] But it is otherwise where the expulsion is illegal,

[94] Gray v. Merriman (Minn. 1894), 57 N. W. Rep. 463; 23 Ins. L. J. 765.

[95] People v. Life Union, 65 N. Y. St. Rep. 867 (no opinion); relying on Matter of Equitable Reserve Fund L. Assn., 131 N. Y. 354. This last case distinguishes People v. Security L. Ins. & Ann. Co., 78 N. Y. 115. See, also, People v. Life and Reserve Assn., 92 Hun (N. Y.), 592.

[96] Pfeiffer v. Weisshaupt, 13 Daly (N. Y.), 151; Society v. Meyer, 52 Pa. St. 125; Woolsey v. Indianapolis Ord. O. F. etc., 61 Iowa, 492.

and no sufficient cause exists therefore,[97] or if the member's right to benefits has accrued prior to his expulsion.[98]

§ **1457. Termination by Withdrawal of Member of Mutual Benefit Society.**—In mutual benefit societies or organizations doing an insurance business, if the contract provides for liability of the member until notice of withdrawal,[99] it would necessarily follow that the contract would be terminated by withdrawal from membership.[100] If the statute provides that a member of a mutual company may withdraw by giving notice in writing and paying all his dues and his proportionate share of the losses up to the date of his withdrawal, the levying of an assessment by the directors and the surrender of the premium note will not relieve a member from further liability where the assessment is insufficient to meet all claims.[101] Where the constitution of a society provides that a member in good standing may sever his connection with the society by making proper application, the payment of all dues, and the

[97] Mulroy v. Supreme Lodge Knights of Honor, 28 Mo. App. 463.

[98] Bachman v. Arbeiter-Bund, 64 How. Pr. (N. Y.) 442.

[99] So provided in Baker v. New York Mut. B. Assn., 27 N. Y. Week. Dig. 91.

[100] See Borgraefe v. Knights of Honor, 26 Mo. App. 218; 22 Mo. App. 127; Union Mut. F. Ins. Co. v. Spaulding, 61 Mich. 77. In this case the court said: "The charter of this company provides that any member may withdraw, on application to the secretary, by surrendering his policy 'and paying to the secretary his proportion of all assessments to which this company is liable at the time of withdrawal.' The by-laws contain the same provision in slightly different words. 'By paying his proportion of all assessments, if any, at the time of his withdrawal.' There can be no doubt on the findings that defendant did pay in full all that was his proportion of any existing losses of the company, as well as of any assessment levied. Whatever losses subsequently arose from failure to collect or from any other cause were not existing losses. . . . . The purpose of a surrender is undoubtedly to cut off all future relations between the parties. This subject was within the contemplation of everyone when the charter was drawn and when defendant became insured. It is a customary and reasonable arrangement. There would be no object in providing for a surrender which would continue to be of no avail so long as any default might exist on the part of any other member."

[101] Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490; 63 N. W. Rep. 1059, under Sanb. & B. Annot. Stats. Wis., sec. 1941 f.

surrender of his certificate and of all the rights and privileges of a member, it is held that the mere fact that he ceases to pay assessments will not of itself terminate his connection with the society, where he takes no other of the prescribed means of accomplishing that end.[102]

§ 1458. Reinstatement by Waiver not by New Contract.—A reinstatement of a member of a beneficiary association may be by way of waiver of a forfeiture, as distinguished from a new contract, as where the original certificate provides that a defaulting member may again renew his connection by a new contract made in the same manner as the first, or that he may be reinstated for valid reasons to the officers of the association; as in case of a failure to receive notice of an assessment, by paying arrearages, and it appears that the member did not surrender the original certificate, nor request a new one, and the applications of the member to the association are more consistent with the theory that a reinstatement, under the existing certificate is sought rather than a new and independent contract.[103]

§ 1459. Renewal of Policy—Amount Must be Fixed. In case of an oral agreement for renewal, the agreement must fix the amount of the contract. Thus if in an oral agreement between the insurer's and applicant's agent as to the renewal of a policy of fire insurance the amount of the policy to be taken is not fixed, the contract is not complete.[104]

§ 1460. Presumption that Renewal Policy is Like Original.—If an agreement to renew a policy is made and no departure from the terms of the original contract is suggested or agreed upon, it will be presumed that the policy to be issued is to be upon the same terms and conditions as the

[102] In re Canadian Relief Soc. (Patterson's Case) (Ont. H. C. J. Ch. Div.), 15 Can. L. T. 216.

[103] Clarke v. Schwarzenberg, 164 Mass. 347.

[104] Sater v. Henry Co. Farmers' M. F. Ins. Co. (Iowa, 1895), 61 N. W. Rep. 209; 24 Ins. L. J. 220.

existing policy.[105] So if one contracts for a renewal policy, and is assured by the agent that it will be like the original one, and the policy is afterward delivered, he has a right to presume that all its terms and conditions are essentially the same as those in the first contract, and he is not bound by a warranty clause in the renewal contract which is not in the first policy.[106]

§ **1461. Misrepresentations and Warranties in Application for Revival.**—A policy may be avoided for representations in an application for revival of a lapsed policy, where such representations are false, and are incorporated into the renewed policy as warranties conditioned that they are true, otherwise that the policy shall be void.[107] If a suspended member of a mutual benefit society is reinstated by the company, with full knowledge on its part of the falsity of the answers in the application, it waives the benefit of a condition of forfeiture in the application.[108]

§ **1462. Immaterial Oral Representation not Inducing Risk—Renewal Valid.**—An oral statement, not referred to in the policy, which is a mere representation and immaterial, and which does not induce the risk, does not invalidate a renewal. This was so held where a policy was issued on the life of a husband for the benefit of his wife, and a renewal was procured from year to year by payment of an annual premium. The last renewal was obtained during the absence of the husband, the wife telling the agent of the company, in response to inquiries about her husband, that she had received a letter from him, and that he was in his usual health.[109]

§ **1463. Where Renewal is on Same Terms and Conditions as Old Contract.**—It is the office of a renewal receipt in life insurance to avoid forfeiture for nonpayment of pre-

[105] Commercial F. Ins. Co. v. Norris (Ala. 1895), 18 S. Rep. 34.

[106] Burson v. Fire Assn., 136 Pa. St. 267; 20 Am. St. Rep. 919.

[107] See Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587; 17 Cent. L. J. 402.

[108] Hoffman v. American Legion of Honor, 35 Fed. Rep. 252.

[109] Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; 14 Am. Rep. 8.

mium, as required by the terms of the policy,[110] and a renewal receipt is not an independent contract extending the insurance, but operates only as a continuance of the old one.[111] So a renewal of a policy of fire insurance is, in effect, a new contract, and, unless otherwise expressed, is on the same terms and conditions as the original policy.[112] But although it amounts to a new contract, it in no way changes the terms and conditions of the original policy, except to continue it in force, and the provisions of the policy as originally issued control the rights of the parties, except as the same are affected by any waiver that may have arisen in the meantime.[113] But, as is stated in a Maryland case,[114] if the original policy contains no provision for extension from year to year, or for its continuance, the original contract is not continued by the payment of a premium, but there is a new contract.[115] The rule is not changed because the premium for the new term is paid by one to whom the policy and the interest assured has been assigned during the life of the original policy, and to whom the renewal receipt is given, for parties to the original contract are not thereby changed, nor is there any substitution of parties, and the renewal is only valid and binding, as to rights and obligations, by reference to the original contract.[116]

§ **1464. Renewal—Cases.**—A notice that the insured premises had become vacant, required and given under the original policy, should be given again under the renewed pol-

[110] Northwestern Mut. L. Ins Co. v. Amerman, 119 Ill. 329; 10 N. E. Rep. 225.

[111] Mutual B. Life Ins. Co. v. Robertson, 59 Ill. 123; Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329; 10 N. E. Rep. 225; Peoria etc. Ins. Co. v. Hewey, 34 Ill. 47; Garner v. Germania etc. Co., 110 N. Y. 266; 18 N. E. Rep. 130; Mutual Ins. Co. v. Deale, 18 Md. 26. See Franklin Ins. Co. v. Massey, 33 Pa. St. 221.

[112] Hartford F. Ins. Co. v. Walsh, 54 Ill. 164; 5 Am. Rep. 115; Brady v. Northwestern Ins. Co., 11 Mich. 445; Lockwood v. Middlesex M. Assur. Co., 47 Conn. 553.

[113] Aurora Fire etc. Ins. Co. v. Kranich, 36 Mich. 289.

[114] Firemen's Ins. Co. v. Floss, 67 Md. 403; 24 Cent. L. J. 558.

[115] See Peoria etc. Ins. Co. v. Hewey, 34 Ill. 47.

[116] New England etc. Ins. Co. v. Wetmore, 32 Ill. 221. See Farmers' Ins. Co. v. Floss, 67 Md. 403; 24 Cent. L. J. 558.

icy, the same state of vacancy continuing.[117] So if nothing is said as to the time the renewal policy is to run, and the same premium is paid, the renewal will be for the same period of time as that in the original policy, as where the term named therein was one year.[118] But where a policy having expired June 10, 1878, a renewal, dated June 19th, by its terms continued the policy in force for a year from June 10th, a loss from a fire occurring June 16, 1879, cannot be deemed within the policy.[119] In another case there was an insurance of two thousand five hundred dollars, eighteen hundred dollars on a mill and seven hundred dollars on the machinery, which was renewed for several years, the renewals expressing the same distribution of the risk, and was then renewed by a receipt, expressing merely that the policy was continued in force for another year, and it was held that the risk was general, of two thousand five hundred dollars, on the whole premises.[120] A renewal or renewals of the policy will be deemed to carry the same waiver of the condition as the original policy.[121] If the assured is informed and understands through the insurer's agent that the renewal is to be in exactly the same terms as the old policy, and there are warranties and conditions inserted therein which were not in the original, the assured will not be bound;[122] and if warranties are inserted in the renewal to which the insured's attention has not been called, and of which he has no knowledge, and which differ from the original policy, this affords a ground for reformation of the policy as to such stipulations.[123] It is presumed that the insurer under a renewal intends to effect a valid contract.[124]

[117] Hartford F. Ins. Co. v. Walsh, 54 Ill. 164; 5 Am. Rep. 115.

[118] Scott v. Home Ins. Co., 53 Wis. 238.

[119] Fuchs v. Germantown Farmers' Mut. Ins. Co., 60 Wis. 286.

[120] Driggs v. Albany Ins. Co., 10 Barb. (N. Y.) 440.

[121] Kruger v. Western F. & M. Ins. Co., 72 Cal. 91; 1 Rail. & Corp. L. J. 242.

[122] Burson v. Fire Assn., 136 Pa. St. 267; 20 Atl. Rep. 401; 26 Week. Not. Cas. 408.

[123] Thomason v. Capitol Ins. Co., (Iowa, 1895), 61 N. W. Rep. 843.

[124] Ludwig v. Jersey City Ins. Co., 48 N. Y. 379.

§ **1465. New Policy may be Only a Renewal.**—The fact that a new policy is issued does not of itself make it a new contract, but it may be merely a renewal; as in the case where a creditor assignee for security of a policy on a husband's life in favor of his wife, believing the assignment void, permits its forfeiture, and obtains upon the original application, and without a new medical examination, a new policy to him as creditor, similar in all respects to the old one, except as to the time of payment of premiums, such policy will be deemed a renewal of the original one, and subject to the same trust in favor of the wife.[125] But it is held in the federal court that the courts will not regard a second policy as the mere continuation of the first, even though by collusion with the company the original policy is suffered to lapse, and another policy is issued naming a new beneficiary.[126]

§ **1466. Renewal or Revival may be Conditional.**—A renewal or revival of a policy may be conditional; as where renewal is made upon condition that the original policy continues in force, and that there has been no change in risk since first insured "not noticed on the books of this company, otherwise this renewal is not binding." In a case of this character under a fire risk issued to the owner of the building covered by the policy it appeared that a portion of the property was sold to one who became insured's partner, and a renewal receipt was issued reciting the receipt of the premium from the partnership, and it was held that the insurers intended to continue the insurance on the property, and on the terms and conditions expressed in the policy, but to the parties who paid the premium.[127] In determining the fact of conditional re-

[125] Barry v. Brune, 71 N. Y. 261; 8 Hun (N. Y.), 395. In this case the assignment was made under the husband's coercion and influence.

[126] Union Mut. L. Ins. Co. v. Stevens, 19 Fed. Rep. 671. But see Whitehead v. New York L. Ins. Co., 102 N. Y. 143; Chaplin v. Fellowes, 36 Conn. 132; Connecticut Mut. L. Ins. Co. v. Westervelt, 52 Conn. 586; Timayenis v. Union Mut. L. Ins. Co., 21 Fed. Rep. 223; 22 Blatchf. (C. C.) 405; Whitridge v. Barry, 42 Md. 140.

[127] Lancey v. Phœnix etc. Ins. Co., 56 Me. 562. But see as to new partner, Vicary v. Moore, 2 Watts (Pa.), 451; Firemen's Ins. Co. v.

newal, the jury may consider all the surrounding circumstances and everything tending to throw light upon the real intention of the parties.[128] If the insurer receives an overdue premium, but informs assured that the rules require a certificate of good health, and requests him to send his own certificate, it is held that this warrants a jury in finding that assured was justified in believing that there had been an absolute, and not a conditional, renewal, even though a certificate of good health was requested.[129] If the revival of a policy by the indorsement of consent is at the option of assured, the policy is not revived by an offer to indorse consent upon conditions not complied with by assured.[130]

§ 1467. Agreement or Waiver Necessary to Renewal or Revival after Forfeiture.—If the policy has become forfeited or void for any cause, it cannot be renewed or revived except there is a waiver or estoppel arising from the acts or statements of the company or its authorized agent, or unless there is an express agreement to revive. Although it is stipulated that there can be no revival of a forfeited policy by the issue of a renewal receipt, or in any other way except by special contract, an authorized agent of the insurer can waive this as well as any other condition, and the insurer, after the issue of a renewal receipt and the receipt of the premium, is estopped to deny the contract.[131] So the parties may agree to revive a lapsed contract upon new terms and conditions, or upon its original terms and conditions, with such additional terms as they may choose to incorporate. Thus, if a life pol-

Floss, 67 Md. 403; 24 Cent. L. J. 558; Lehigh Coal Co. v. Harlan, 27 Pa. St. 429.

[128] Rockwell v. Mutual etc. Ins. Co. (1870), 27 Wis. 372.

[129] Rockwell v. Mutual etc. Ins. Co., 27 Wis. 372.

[130] So held in Supple v. Iowa State Ins. Co., 58 Iowa, 29 (one judge dissenting).

[131] Shafer v. Phœnix Ins. Co., 53 Wis. 361. As to revival by payment of premiums, see Lantz v. Vermont L. Ins. Co., 139 Pa. St. 546; 23 Am. St. Rep. 202. That express agreement is necessary, see Diehl v. Adams Co. etc. Ins. Co., 58 Pa. St. 443; 98 Am. Dec. 302. See chapter on agency, where the question of the right of an agent to waive contrary to express conditions of policy is fully discussed.

icy is forfeited by the nonpayment of premium when due, and an application is made representing certain facts and warranting their truth and the truth of those in the original application, upon the insurer's assent thereto, the pre-existing contract becomes reinstated upon all its original terms, and there is incorporated into it the additional terms expressed in the revival application, and the representations contained in said application become part of the completed contract, and their truth is warranted.[132] If an agent authorized to make insurance contracts represents to insured that his policy is renewed, and accepts and appropriates money paid over under such belief, the company is estopped to deny the renewal or extension.[133]

§ **1468. Agreement to Renew not within Statute of Frauds.**—An agreement that a policy shall be renewed by certificates of renewal from year to year, either party being at liberty to give notice at any time that the arrangement shall not be continued, is not within the statute of frauds.[134]

§ **1469. Renewal Need not be Under Seal.**—A renewal of a policy of insurance need not be under seal, and this is so held although the policy is so;[135] and an action of covenant will lie on a sealed policy of insurance, renewed by a parol receipt, where the policy provides for the continuance of itself by its own terms, on the payment of the premium and taking a receipt therefor.[136]

§ **1470. Agent's Agreement to Renew—Delivering Renewal Receipt.**—The insurer may be bound by an agreement

[132] Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587; 17 Cent. L. J. 402.

[133] International Trust Co. v. Norwich U. F. Ins. Soc., 71 Fed. Rep. 81. See chapters on agency, herein.

[134] Commercial F. Ins. Co. v. Norris (Ala. 1895), 18 S. Rep. 34; Trustees of First Baptist Church v. Brooklyn F. Ins. Co., 19 N. Y. 305.

[135] Lockwood v. Middlesex M. Assur. Co., 47 Conn. 553; Ludwig v. Jersey City Ins. Co., 48 N. Y. 379.

[136] Herron v. Peoria Marine etc. Ins. Co., 28 Ill. 235; 81 Am. Dec. 272.

of renewal made with its authorized agent, even though the renewal receipt or policy is not delivered to the insured, but to the agent, and is retained by him, it appearing so to have been done at the insured's request. Thus, where before the date of expiration of certain policies plaintiffs informed their agents that they wished these policies renewed, and they in turn notified agents of the insurers to hold said policies as they would be renewed, and the agents of the insurers agreed to this proposition, and also agreed after the policies had expired to hold them until the plaintiffs had been seen regarding the form, and, though the plaintiffs and their agents lived near each other, nothing was done for several days, it was held that the plaintiffs might recover.[137] So in a federal case the agent of the company, upon request of assured, filled out and countersigned a renewal receipt, the prior renewal not having expired, and having, at assured's request, retained the same, it was held that there was a sufficient delivery of the renewal receipt to continue the policy in force.[138]

§ **1471. Right to Reinstatement may Pass to Beneficiary.**—The right of insured to be reinstated does not die with him, but passes to his beneficiary.[139] But if a member neglects during his lifetime to conform to the terms of the certificate and requirements of the order relating to reinstatement, his restoration to membership cannot be effected after his death, by payment of the sum due from him to the company at the time of his death, though the period within which, if alive, he could have secured his reinstatement has not yet expired.[140]

§ **1472. Reinstatement of Member.**—The right of a member to be reinstated depends largely upon the laws of the so-

[137] Baker v. Westchester F. Ins. Co. (Mass. 1895), 38 N. E. Rep. 1124.

[138] Tennant v. Travelers' Ins. Co., 31 Fed. Rep. 322.

[139] So held in Dennis v. Massachusetts B. Assn., 120 N. Y. 496; 17 Am. St. Rep. 660. See Van Houten v. Pine, 38 N. J. Eq. 72; Connelly v. Masonic etc. Assn., 58 Conn. 552.

[140] Modern Woodmen of America v. Jameson, 48 Kan. 718; 31 Pac. Rep. 733; 29 Pac. Rep. 433. As to reinstatement by payment of premium after death, see note to 14 L. R. Annot. 283.

ciety, or rather upon his contract made with it, and it may be stated generally that courts will compel a reinstatement where the member fully complies with all the requirements of the contract or laws of the society; for the society may not, for arbitrary reasons, refuse to permit the assured or his beneficiary to receive the benefits of a contract, which has been fully complied with in all its legal requirements as to reinstatement. But, on the other side, the assured is, as a rule, obligated to comply with the legal requirements of his contract with the society. These general principles are fully sustained by the authorities.[141] So the mere record of a sentence of suspension, without any proceedings whatever to found it upon, and which is not according to the laws of the order, is not conclusive as to membership and standing, and an application for reinstatement is not evidence of suspension.[142] If the by-laws of a mutual association provide for reinstatement on presenting sufficient excuse, the member having been dropped for nonpayment of dues, the association may be compelled to pay the insurance to the beneficiary, if the member has presented a sufficient excuse, where he was not reinstated simply because of his precarious health.[143] The mere payment of assessments to the financial secretary or supreme treasurer does not operate to reinstate a member where those officers have no authority to waive the laws of the society, which require a new medical certificate and a majority vote.[144] But an officer may reinstate if he has authority under the laws of the order, and the suspension is illegal.[145] If a member is expelled on a charge for which only a fine is provided, and is reinstated merely to be again expelled on another charge, which is in reality the same offense as the first,

[141] As to latter proposition, see Donald v. Supreme Coun. etc., 78 Cal. 49; Dickinson v. Grand Lodge (Pa.), 28 Atl. Rep. 293; 23 Ins. L. J. 863. See Modern Woodmen of America v. Jameson, 48 Kan. 718; 31 Pac. Rep. 733; 29 Pac. Rep. 438; Lyons v. Supreme Assembly R. S. of C. F., 153 Mass. 83; 26 N. E. Rep. 236.

[142] Lazensky v. Supreme Lodge Knights of Honor, 31 Fed. Rep. 592.

[143] So held in Van Houten v. Pine, 38 N. J. Eq. 72.

[144] Lyon v. Supreme Assembly R. S. of C. F., 153 Mass. 83; 26 N. E. Rep. 236.

[145] Connolly v. Masonic etc. Assn., 58 Conn. 552.

he will be restored to the rights and privileges of membership.[146] The question whether delay in applying for reinstatement is justifiable is for the jury where the society's past dealings with the member have been such as to induce a belief that such delay was immaterial.[147] If a benefit certificate provides that the member must be in good standing at the time of his death, and several months prior thereto he is suspended and receives notification of the proceedings against him, but does not appear to defend against the charge, nor avail himself of any of the remedies provided by the rules of the society, nor attempt by means of legal proceedings to obtain reinstatement, there can be no recovery.[148] If a member has been expelled from a society and has been subsequently reinstated by a decree of court, he should present the decree in a regular manner, and demand his reinstatement of the officers. He cannot assert his status by simply appearing at the next meeting after the decree, and insisting upon his rights without informing the officers in a regular manner of the action of the court.[149]

§ **1473. Suspension of Risk.**—The policy may provide for suspension of the risk during the existence of a certain contingency, as in case of an exception of liability for damage from a certain peril, and that the risk shall be suspended while such peril continues.[150] So the contract may exclude certain ports and places from the protection of a policy within a specified period, which may operate not as an exclusion of voyages, but only as a suspension of risk during such time as the vessel may be at the excepted ports and places.[151] So a fire

[146] Otto v. Journeymen Tailors' etc. Union, 75 Cal. 308; 17 Pac. Rep. 217.

[147] Jackson v. Northwestern Mut. Relief Assn., 78 Wis. 463; 47 N. W. Rep. 733.

[148] Supreme Lodge K. of P. v. Wilson, 14 U. S. C. C. 264; 66 Fed. Rep. 785.

[149] So held in McLafferty v. Sweeney, 9 Atl. Rep. 277.

[150] Commercial Union Assur. Co. v. Canada Iron etc. Co., 18 L. C. Jur. (Q. B.) 80.

[151] Palmer v. Warren Ins. Co., 1 Story (U. S.), 360; Greenleaf v. St. Louis Ins. Co., 37 Mo. 25, 30. See Wilkins v. Tobacco etc. Ins. Co., 2 Sup. Ct. Cin. Ohio, 204.

risk may be stipulated to be suspended during the existence of certain conditions, or while the property is exposed to specified hazards or perils.[152] Another class of decisions presents the question whether in the case of the nonexistence of a stipulation as against alienation or assignment a change of title or interest and a reconveyance merely suspends the risk, or operates to avoid the policy, and it is held that such temporary transfer merely suspends the risk, and that upon a retransfer to assured the policy revives.[153] So the risk may be merely suspended by the removal of goods temporarily from the protection of the policy; as where under a marine risk goods are to be covered when only waterborne, and they are temporarily landed and subsequently placed on board the vessel.[154] So where, according to custom, goods are unloaded and put in a storeship, the risk is continued and the underwriters liable for loss.[155] We have, however, considered the question of suspension of risk more fully elsewhere.[156]

§ **1474. Duration of Risk—Effect of War.**—It is held that policies effected in time of peace continue though a war

[152] Grant v. Howard Ins. Co., 5 Hill (N. Y.), 10.

[153] Worthington v. Bearce, 12 Allen (Mass.), 382, per Bigelow, C. J.

[154] Worthington v. Bearce, 12 Allen (Mass.), 382, per Bigelow, C. J.; 1 Phillips on Insurance, 3d ed., p. 542, sec. 976, who says: "Thus, where a cargo is insured for a voyage, and by construction of the policy the risk is not covered while the goods are on land, there is no reason why it should not revive when the cargo is again put on board of the ship. In this and other cases, while the goods are not exposed to any of the perils insured against, either by not conforming to the description in the policy or because they are for a time not exposed to such perils, the risk temporarily ceases, and recommences on the goods being again brought within the situation contemplated by the parties and described in the policy. The risk may not be so interrupted when by the action of the perils insured against, or for the due prosecution of the voyage, the subject matter is put out of the condition in which the policy supposes it to be": Citing Boudrett v. Heutigg, 1 Holt, 149; Pelly v. Royal Exch. Assur. Co., 1 Burr. 341; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14.

[155] Tierney v. Etherington, cited in 1 Burr. 348, 349. See Agricultural Co. v. Saunders, L. R. 10 Com. P. 668.

[156] See chaps. 37 and 38, and chapter on seaworthiness. As to suspension of member, see chapter on assessments.

breaks out, but that the insured must not do anything to add to the risk of the insurer.[157] It is also held that if, after the commencement of the voyage, a war breaks out between the country to which the property belongs and a foreign country, the policy is not vacated, and the insurers are not liable for a loss arising out of the state of war.[158] It is also decided that a war which places the insured and insurer under a life policy within the opposing lines of the belligerent powers terminates the contract.[159]

[157] Croussillat v. Ball, 3 Yeates (Pa.), 375; 4 Dall. (C. C.) 294; 2 Am. Dec. 375.

[158] Saltus v. United Ins. Co., 15 Johns. (N. Y.) 523. See Furtado v. Rogers, 3 Bos. & P. 191.

[159] Tait v. New York L. Ins. Co., 1 Flip. (C. C.) 288. Examine, however, c. xi, herein, where this subject is more fully considered.

CHAPTER XXXVII.

ATTACHMENT AND DURATION OF RISK—THE SHIP.

SUBDIV. I. Attachment and Duration of Risk—The Ship.
SUBDIV. II. Continuance and Termination of Risk—The Ship.

SUBDIV. I. Attachment and Duration of Risk—The Ship.

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SUBDIV. II. Continuance and Termination of Risk—The Ship.

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SUBDIV. I. Attachment and Duration of Risk—The Ship.

§ 1483. Attachment and Duration of Risk on Ship—Generally.—Emerigon, in his work published in 1783, reviews the then existing laws of the several maritime states as to the time of commencement and the duration of the risk, and says that the French Ordonnance of 1681, drawn up after the old maritime laws, had taken a just medium, and provided that "if the time of the risks be not regulated by the contract, it will run, with regard to the ship, its rigging, furniture, and stores, from the day it shall have set sail until anchored in the port of its destination and moored at the quay." [1] According to both Mr. Marshall and Mr. Arnould, the time of the commencement of the risk on the ship in England varies in different cases, depending entirely on the terms of the policy and the

[1] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 2, p. 536, et seq. He considers the Réglement of Antwerp and Amsterdam, the forms of Nantes, Bordeaux, Rouen, Antwerp, Genoa, Ancoria, and Hamburg, and the Guidon and Ordonnance.

nature of the voyage.[2] In the United States, inasmuch as the parties may in this, as in other, cases stipulate as they shall choose, the time of the commencement of the risk must depend upon the contract, and such circumstances and usage as are admissible in evidence to aid in its construction. And in general the attachment and duration of the risk must depend upon whether the policy be a time voyage or mixed policy; upon the character of the voyage as described in the policy, the express stipulations therein with reference to the same, and usage, so far as the same may form part of the contract, and other circumstances, such as the length of time the vessel has been in port; what constitutes a port; whether the word "port" or "ports" is used; whether the voyage be an entire voyage or the risk severable; whether the ship is at a home port or a foreign port; whether the ship be on a passage or at sea; upon detention of a ship by an embargo, or a deviation or an intended deviation, or sailing upon a different voyage, etc. These various points will, however, be considered hereafter. Only the precise risk which is contemplated can be introduced into contracts of marine insurance, and this principle applies to contracts of inland navigation;[3] and insurance on the ship does not cover both ship and cargo, even though it be upon the ship generally, and she is then laden.[4] So an insurance on a ship is an insurance for the time specified, or of the ship for the voyage, not of the ship and the voyage.[5]

§ 1484. Detention by Embargo after Voyage Commenced.—Where the ship sets sail, and just before she gets under way the pilot hears that an embargo has taken place, and before the ship is out of port she is stopped and detained

[2] 1 Marshall on Insurance, ed. 1810, *261; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 446, *442; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 403, 404.

[3] Atwood v. Reliance Trans. Co., 9 Watts (Pa.), 87; 34 Am. Dec. 503.

[4] 1 Marshall on Insurance, ed. 1810, 320 a.

[5] Ritchie v. United States Ins. Co., 5 Serg. & R. (Pa.) 501; Alexander v. Baltimore Ins. Co., 4 Cranch (U. S.), 370, per Marshall, C. J.; Pole v. Fitzgerald, Willes, 641, per Willes, C. J.

by virtue of the embargo act, the insured is not in such case charged with knowledge of the act laying an embargo so as to invalidate the policy, and the voyage having commenced before the detention, the insurer may be liable for a total loss.[6]

§ 1485. Attachment of Risk—Vessel Building—"Waterborne"—"Safely Launched," etc.—If a policy is upon a vessel building at P., to "take effect as soon as waterborne" "at and from" P., the policy will attach at once at the time it is executed, when the vessel is waterborne the day prior thereto, although she is at a second port, where she was towed, according to custom, to be made seaworthy for the continuance of her voyage, the policy giving her "liberty to ship at," or "to proceed to," a second port.[7] And where the insurance is effected upon a new ship still upon the ways, to continue while being safely launched and until moored twenty-four hours in safety, the policy being in the usual marine form, the risk attaches the moment the launching begins, and the policy should be construed with reference to the special nature of the risk designed to be covered, and affords protection from accidents during launching not imputable to the fraud, ignorance, or misconduct of those in charge of the vessel.[8]

§ 1486. Attachment of Risk "at and from" Home Port.—If the insurance is "at and from" the terminus a quo of the voyage insured, being the home port at which the ship is then lying, the risk attaches at once the insurance is effected, and continues thereon the whole time the ship is there preparing for her voyage.[9] The phrase "at and from" A to B, does

[6] Walden v. Phœnix Ins. Co., 5 Johns. (N. Y.) 310; 4 Am. Dec. 359.

[7] Cobb v. New England Mut. Ins. Co., 6 Gray (Mass.), 192.

[8] Frichette v. State etc. Ins. Co., 3 Bosw. (N. Y.) 190.

[9] Seamans v. Loring, 1 Mason (C. C.), 127, per Story, J.; Palmer v. Marshall, 8 Bing. 79; Molleux v. London Assur. Co., 1 Atk. 548; Smith v. Steinbach, 2 Caines Cas. (N. Y.) 158; 1 Marshall on Insurance, ed. 1810, 261 a; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 447, *442. 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 404; Richards on Insurance, 2d ed., 222.

not describe the property insured, but only the voyage during which the risk is to continue.[10]

§ 1487. Prior Parol Agreement as to Time of Commencement if Risk Cannot Change Policy.—A parol agreement as to the time the risk shall commence which is contrary to the terms of the policy cannot aid the party claiming under such parol agreement; it is not competent evidence to change the actual written contract.[11]

§ 1488. Attachment and Duration of Risk where Voyage Insured is Changed or Abandoned.—In the consideration of this question the distinction which exists between the voyage insured and the voyage of the ship is important. Emerigon says: "It is necessary, in this respect, to distinguish the voyage insured from the voyage of the vessel, and to consider the voyage that the ship makes only to compare it with the voyage designated in the policy, cum viaggio promisso et comprehenso in assecuratione. This distinction is essential, and should not be forgotten."[12] In the case of an intention to deviate only the usual course of the voyage is intended to be voluntarily departed from without necessity, and the intention of going ultimately to the terminus ad quem of the voyage insured is never absolutely lost sight of and given up, and herein lies the distinction between a deviation and a change or abandonment of the voyage insured. In the latter case the terminus ad quem of the voyage insured is absolutely lost sight of and given up. The vessel may sail for an entirely different port of destination than the terminus ad quem of the voyage insured, the intention of changing being fixed before the commencement of the risk; or the ship having sailed, the original destination may be permanently abandoned with intent not to go at all to the terminus ad quem of the voyage insured, but to go elsewhere. In both these latter cases there is a new

[10] Melcher v. Ocean Ins. Co., 59 Me. 217.

[11] Whitney v. Haven, 13 Mass. 172.

[12] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, p. 531. See sec. 2366, herein.

and distinct voyage—the voyage is changed.[13] In the first of the two cases above specified as constituting a change of voyage the risk never attaches. In the latter, the insurer is discharged by the abandonment of the voyage insured. It therefore constitutes a defense to an action on the contract that the vessel never sailed on the voyage insured, or sailed for an entirely different port of destination, or that the insurer is discharged by the abandonment of the voyage after it has commenced.[14] But if the voyage actually sailed is that contemplated by the terms of the policy, the insurance will attach.[15] So the risk may attach though the ship clears for a different voyage or port, if her actual destination is that of the voyage

[13] Woolridge v. Boydell, Doug. 16 a; New York Firemen's Ins. Co. v. Laurence, 14 Johns. (N. Y.) 46, per Kent, Ch.; Hearne v. Marine Ins. Co., 20 Wall. (U. S.) 488; Kewley v. Ryan, 2 H. Black. 343; Tasker v. Cunningham, 1 Bligh, 87; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274; Sellar v. McVickar, 4 Bos. & P. 23; Friend v. Gloucester Ins. Co., 113 Mass. 326; Clark v. Protection Ins. Co., 1 Story (C. C.), 109, 130; Tait v. Levi, 14 East, 481; Foster v. Wiliner, 2 Str. 1249; Alexander v. Baltimore Ins. Co., 4 Cranch (U. S.), 370; Maryland Ins. Co. v. Wood, 6 Cranch (U. S.), 29; Way v. Modigliani, 2 Term Rep. 30; Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241. "If the vessel sails for quite another destination than that of the voyage insured, or if arrived in the latitude and view of the place of destination she goes to a place more distant, or if in wandering from the proper route on which she had entered she abandons her original destination to go elsewhere, in all these cases the voyage is changed . . . . for the converse reason the voyage is still presumed the same when the captain, without losing sight of his first destination, strays from it only in accessories," etc.: Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 14, p. 574, et seq.; sec. 11, p. 568, sec. 9, p. 565. See, also, 2 Parsons on Marine Insurance, ed. 1868, 36, 40, 41; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 350, *344, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 366, 367, 452, 453, et seq., 459; 1 Phillips on Insurance, 3d ed., sec. 549, et seq., secs. 990-96; 1 Marshall on Insurance, ed. 1810, *184, *326. As to distinction between an intended deviation and a different voyage, 1 Marshall on Insurance, ed. 1810, p. 202, et seq.; Henshaw v. Marine Ins. Co., 2 Caines (N. Y.), 274. And see secs. 2365-2373, herein.

[14] Kerr v. Farlis, 1 Shaw & D. 384; Forbes v. Church, 3 Johns. Cas. (N. Y.) 158; Merrill v. Boyleston F. & M. Ins. Co., 3 Allen (Mass.), 247; Wooldridge v. Boydell, 1 Doug. 16. And see cases in last note.

[15] Hobart v. Norton, 8 Pick. (Mass.) 159; Steinbach v. Columbian Ins. Co., 2 Caines Cas. (N. Y.) 129.

insured; as where a policy is written from C. to P., and the ship clears for A., but the actual destination for which she sails is P., the insurer is not discharged.[16] But where the voyage insured is a specific part of another voyage already commenced, the making without fraud or misconduct, but by necessity, an intermediate voyage, whereby the risk insured is postponed as to its commencement, is not such an abandonment of the previous part of the voyage as to prevent the commencement of the voyage insured, where the vessel returns at once to the port of commencement of the insured voyage and sails thereon.[17]

§ 1489. Attachment and Duration of Risk—Time Policy. The time may be limited or not limited in marine insurances. The insurance may be on a ship for a limited time specified without designation of the voyage, and the duration of the risk is limited thereby. A strictly time policy insures no specific voyage or voyages; it limits the vessel to no geographical track, but extends to and covers any voyage or voyages undertaken within the period limited. The protection does not, however, exceed such time, only extending to the loss and damage the ship may actually sustain by the perils insured against at any time within the period designated by the two extreme points of time and intended by the insurance, and the insurer is free from the expiration of the time. The ship may be with

[16] McFee v. South Carolina Ins. Co., 2 McCord (S. C.) 503; Talcot v. Marine Ins. Co., 2 Johns. (N. Y.) 130; Barnewall v. Church, 1 Caines (N. Y.), 217. See secs. 2375-2377, post, as to merely intended destination.

[17] Driscoll v. Passmore, 1 Bos. & P. 210. In this case the voyage insured was from S. to L., being a part of a voyage from L. to M., thence to S., and thence back to L., the insurance being based upon the intelligence that the ship was at M. and about to proceed to L. on the original voyage, which representation was true when made, but owing to subsequent events, not happening through misconduct chargeable to the insured, the ship was compelled to return to L., but arriving there the charterers insisted that she proceed to S., which she did, and was captured on the voyage from S. to L.; the voyage insured was held to have commenced, and the underwriters liable. It was urged by defendant's counsel in this case that the previous voyage was abandoned. See chapter on "deviation," herein.

or without cargo, and in strictly time policies no reference is had to the place where the ship may be at the time of the commencement or end of the period designated, and it is immaterial whether the object of the voyage be then accomplished or not. Such insurances are favorable to maritime commerce, and are lawful and valid. Time policies arise from the fact that it is often impossible, owing to the character of the voyage, to fix definitely the termini by places, as where the ship is to be engaged in trading or fishing voyages, and the like.[18] Under a strictly time policy it constitutes no objection that the risk may continue as long as the vessel may exist, for outside of the terms of the insurance there is no limitation as to the extent of such policies in the United States.[19] In England, a time policy extending over a period of twelve months is void.[20] No such limitation, however, exists in this country. If the time of the commencement of the risk under such a policy is not specified, it will attach from the time the insurance is effected.[21]

§ 1490. Attachment and Duration of Risk—Mixed Policy.—Although the voyage may be designated by the policy, the risk may nevertheless be limited to time. Thus, in a

[18] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 1, p. 532, et seq., sec. 4, p. 549; Melcher v. Ocean Ins. Co., 59 Me. 217; Tyrie v. Fletcher, 2 Cowp. 666; Grousset v. Sea Ins. Co., 24 Wend. (N. Y.) 209, per Nelson, C. J.; Howell v. Protection Ins. Co., 7 Ohio, 384; Union Ins. Co. v. Tysen, 3 Hill (N. Y.), 118, per Cowen, J.; Seidgett v. Secretan, 6 L. R. Com. P. 616; 40 L. J. Com. P. 257; Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283; Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378, per Story, J.; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 414, p. *409, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 371; 1 Parsons on Marine Insurance, ed. 1868, 304, et seq.

[19] Cleveland v. United Ins. Co., 8 Mass. 308.

[20] 30 Vict., c. 23, sec. 8. The statute 35 Geo. III, c. lxiii, provided also that the time covered should not exceed twelve calendar months, and that the risk should commence and end accordingly wherever the ship might be. See Lishman v. Northern Maritime Ins. Co., L. R. 8 Com. P. 216.

[21] Ball v. Knight, Fitz-G. 274.

mixed policy the voyage may be prescribed, but the ship may only be protected during a specified time.[22]

§ **1491. Intent to Insure Vessel on Time Irrespective of Place where She may be.**[23]—If it appears that the intent is to insure a vessel from a specified date or time, irrespective of the place where she may be, the policy will attach on the day or time specified, according to the manifest intent of the parties, without regard to place; nor is it necessary under a time policy on a ship, the day of the attachment of the risk being specified, that the vessel should be at the commencement of the risk where she is stated to be in the policy.[24] Thus, an insurance was made on a vessel for one year, "commencing the risk at B., on a day certain at noon," and it happened the vessel had left the port of B. on the day preceding, but was at good safety at sea on the day fixed, and was afterward lost within the year. The underwriters were held nevertheless liable.[25] So an insurance on a vessel "at and from Calais, Maine, on July 16th to, at, and from all places to which she may proceed in the coasting business for six months," attaches on the day named, whether the vessel was then at Calais or not.[26] And if an insurance is by the terms of the policy to commence wherever the ship may be in safety on a specified day, with permission to navigate the Mississippi from one named city thereon to another, such permission does not affect the commencement of the risk so as to control the express agreement concerning the same; it is a limitation upon the assured, and an exception in favor of the company, to be construed

[22] Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389, examine sec. 1491, herein; Pitt v. Phœnix Ins. Co., 10 Daly (N. Y.), 281; Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 1, p. 534, et seq.; Way v. Modigliani, 2 Term. Rep. 30; Grousset v. Sea Ins. Co., 24 Wend. (N. Y.) 210.

[23] See sec. 1493, herein.

[24] Grousset v. Sea Ins. Co., 24 Wend. (N. Y.) 209; Schroeder v. Stock etc. Ins. Co., 46 Mo. 174; Kent v. Manufacturers' Ins. Co., 18 Pick. (Mass.) 19; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389; 32 Am. Dec. 220; Manly v. United Ins. Co., 9 Mass. 85; 6 Am. Dec. 40.

[25] Manly v. United Marine etc. Co., 9 Mass. 85; 6 Am. Dec. 40.

[26] Martin v. Fishing Ins. Co., 32 Am. Dec. 220.

most strongly against it.[27] So an insurance on a ship at and from N. C. and H. for six calendar months is an insurance for the period specified on a trading voyage or voyages at and from either of the named ports without restriction, and the six months not having expired when the vessel arrives at H., and she sails for New York within the period of limitation, the underwriters are liable for a loss within said period;[28] and if no port is mentioned, the policy being on time simply, it is declared that a trading voyage is necessarily implied.[29]

§ 1492. Time Specified for Continuance of Risk after Arrival on Voyage Insured.—A ship may be insured on a voyage from port to port, the risk to continue for a certain time after the ship's arrival at her final destination. Thus, a policy may be "at and from" or "from" a certain port to another, the risk to continue for a certain number of days after the ship's arrival, and in such case it is held that if the ship arrives and discharges her cargo, and is chartered to carry another cargo, and thereafter, but within the specified time, sustains a damage, that the insurers are discharged, for the substantial purpose of the insurance is effected and the risk terminated.[30] But in another case, where the insurance was "on ship from L. to any port or ports in the North or South Pacific Ocean," and "during thirty days' stay in her last port of discharge," it was held that a loss occurring within thirty days after her arrival, excluding from the computation the twenty-four hours immediately following said arrival, was covered by the policy.[31]

§ 1493. Attachment and Duration of Risk under Time Policies, the Voyage being Described.—There is a cer-

[27] Schroeder v. Stock etc. Ins. Co., 46 Mo. 174.

[28] Grousset v. Sea Ins. Co., 24 Wend. (N. Y.) 210.

[29] Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 289, per Savage, C. J. See, also, Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 3, p. 543, et seq.

[30] Gambles v. Ocean Marine Ins. Co., 1 Ex. D. S.

[31] Mercantile Marine Ins. Co. v. Titherington, 5 Best & S. 765; 34 L. J. Q. B. 11. See Lindsay v. Janson, 28 L. J. Ex. 315; 4 Hurl. & N. 699. See, also, secs. 1537-1546, as to termination of risk when vessel moored twenty-four hours in safety.

tain class of policies wherein the voyage is described by termini, the risk being limited by time specified; or where the time of the commencement of the risk is stipulated, the insurance being on the vessel from one port to another; or where the risk is for a specified time, to commence at a named port on a day and hour certain. Thus, an insurance "at and from" A to B for six months; or "at and from" a specified day "from" and "to" certain ports; or an insurance for one year, commencing the risk at B. on a certain day and hour. The question arising under such policies is one of construction, dependent upon the intent of the parties and the purpose of the insurance. The main inquiry should be directed toward discovering that intent and purpose, and ascertaining whether a time or voyage policy is contemplated. The decisions here incline toward limiting such contracts to be time policies, and seem to indicate that in describing the voyage it is not thereby intended to control, by designating the ports or termini, the stipulations as to the time of the commencement of the risk or its termination, unless the policy is so worded that it is evidently intended that the port designated as the terminus a quo should exclude every other place with reference to the attachment of the risk, and necessitate the ship being at said port on the particular day from which the policy is to take effect. The law, however, is not definitely settled as to the effect of such stipulations. But if the description of the voyage does not control, and it is held that it does not,[32] the stipulations as to the time of the commencement and termination of the risk, it would seem that, 1. The risk must commence and the loss be actually incurred within the limits of the time specified in the policy;[33] 2. The ship need not be at the port named as the terminus a quo in the policy at the day the risk is to commence under the policy;[34]

[32] Manly v. United F. & M. Ins. Co., 9 Mass. 83; 6 Am. Dec. 40, per the court.

[33] See authorities cited under this section.

[34] Manly v. United M. & F. Ins. Co., 9 Mass. 85; 6 Am. Dec. 40, noted above in sec. 1491; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389; 32 Am. Dec. 220, noted above in sec. 1491 (In this case it appeared that the intent was to insure for a stated period, irrespective of the place where the vessel was to be); Way v. Modigliani, 2 Term Rep. 30.

3. If within the time specified the vessel begins the described voyage from the place designated, although not at the day or hour named as that of the commencement of the risk, the insurance will attach;[35] 4. The ship must sail on the voyage described, and no other;[36] 5. The loss must be incurred while the vessel is sailing on the voyage described on the course, and within the time specified;[37] 6. The insurer will be discharged if on the day specified for the commencement of the risk the ship sails on an entirely different voyage, even though after said day she is lost while sailing in the same track as the prescribed course;[38] 7. The risk attaches where the vessel has already sailed from the specified terminus a quo, and is at sea on the prescribed course, on the day specified, sailing the described voyage;[39] 8. Such policy may attach, such being the evident intent of the parties, immediately upon the expiration of a prior time policy, the ship being at sea prosecuting her voyage, although the date of the termination of the time policy is later than the date of the commencement of the mixed policy;[40] 9. The risk will end within the specified time, whether the ship be at the designated terminus ad quem or not, or there at the time specified or before.[41] In applying these rules the premises above stated should be remembered, and the fact should not be lost sight of that the cases upon which they are based were decided upon that construction of the terms of the

[35] See the authorities cited under this section and the opinions of the courts therein.

[36] Way v. Modigliani, 2 Term Rep. 30, noted in 1 Marshall on Marine Insurance, ed. 1810, *326.

[37] Way v. Modigliani, 2 Term Rep. 30, noted in 1 Marshall on Marine Insurance, ed. 1810, *326.

[38] Woodridge v. Boydell, 1 Doug. 16, noted in 1 Marshall on Insurance, ed. 1810, *325 (H. Black. Rep. 231). In this case the ship was captured while sailing on the same track as the prescribed course before she had reached the point to diverge for continuing the voyage on which she had sailed, but which was not the voyage described, and it appeared that there was no intention to sail the voyage described: Way v. Modigliani, 2 Term Rep. 30, noted in 1 Marshall on Insurance, ed. 1810, *326. See sec. 1488, herein, as to change of voyage.

[39] Manly v. United M. & F. Ins. Co., 9 Mass. 85; 6 Am. Dec. 40.

[40] Kent v. Manufacturers' Ins. Co., 18 Pick. (Mass.) 19.

[41] Manly v. United M. & F. Ins. Co., 9 Mass. Rep. 85; 6 Am. Dec. 40.

contract which would in each particular case best effectuate the manifest intent of the parties to the contract, so far as consistent with the rules of construction and of law applicable. It should also be remembered that although the voyage is designated, the parties may nevertheless stipulate by special agreement that the risk may be governed as to its duration by time.[42] If the original policy covers a risk upon the vessel within certain waters, but thereafter, upon request for an extension of the risk, but without the payment of an additional premium, a rider is attached limiting the risk and excluding trips on waters before included, such rider controls, and the insurer is not liable for a loss occurring upon waters excluded by the terms of said rider.[43]

§ **1494. Attachment of Risk "at and from"—Delay in Port should not be Unreasonable.**—It is undoubtedly true that the ship should under an insurance "at and from" be ready to sail as soon as she reasonably can, or at least that she must not unnecessarily delay the commencement of her voyage, but such delay is permitted as is reasonable, necessary, and incurred bona fide, and in sound discretion to enable the ship to leave port in good condition to pursue her voyage, and if after such an insurance is effected she lies in port for an unreasonable length of time, unaccounted for, and does not sail, not being detained for repairs or other necessary cause connected with the purpose of the voyage insured, the insurers cannot be held. If a long delay is contemplated, the ship should be insured in port for a definite time and on the voyage to be commenced thereafter.[44] Although the rule is as above

[42] For a further consideration of the questions above considered, see 1 Arnould on Marine Insurance, Perkins' ed. 1850, 418-21, *412-15; 1 Parsons on Marine Insurance, ed. 1868, 311-15; 1 Phillips on Insurance, 3d ed., 503, sec. 928.

[43] Mark v. Home Ins. Co., 13 U. S. C. C. A. 157; 64 Fed. Rep. 801; 52 Fed. Rep. 170.

[44] Palmer v. Fenning, 9 Bing. 462, per Park, J.; Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 283; Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254; Phillips v. Irving, 7 Man. & G. 325; Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 14; Motteux v. London Assur. Co., 1 Atk. 548; Palmer v. Marshall, 8 Bing. 318, per Tindall, C. J.; Chitty v. Selwyn,

given, its application must be governed by circumstances, for from the very nature of the case the determination of the point whether the delay is justified can rest upon no positive or arbitrary rule. What may be a reasonable delay in one case would not necessarily be excusable in another, as is evident from the decisions. The existing state of things in the port where the vessel may be affords a constant rule of guidance in such cases,[45] and whether the ship delays an unreasonable time is a question for the jury.[46] Thus, the length of time which elapses between underwriting the policy and the sailing of the vessel is not alone of itself sufficient to discharge the insurers, provided the delay be accounted for, as it may result from necessity or be otherwise justified; there must be a clear imputation of unjustifiable waste of time.[47] If the policy attaches at the port of lading, but the vessel delays sailing for nearly four months without excuse, the insurers are discharged.[48] But a delay of six months in port after the date of the policy and before the commencement of the voyage has been held not an unusual or unnecessary delay, the vessel being insured for a voyage to India. The court said that several months may have been necessary to complete the insurance.[49] And so although the vessel is detained forty-five days in making necessary repairs and testing the machinery, the policy is not thereby avoided, although the application states that the vessel is in perfect order and "warranted to sail in a few days"; [50] and it

2 Atk. 539, per Lord Hardwicke; De Wolfe v. Archangel M. B. & Ins. Co., L. R. 9 Q. B. 451; Foster v. Jackson Mar. Ins. Co., Edm. Sel. Cas. (N. Y.) 290; Smith v. Surridge, 4 Esp. 25; Small v. Gibson, 16 Q. B. 141; Langhorne v. Alnutt, 4 Taunt. 511; Little v. St. Louis P. Ins. Co., 7 Mo. 379; Hartley v. Buggin, 3 Doug. 39; Grant v. King, 4 Esp. 174.

[45] Phillips v. Irving, 7 Man. & G. 328, per Tyndall, C. J. See Mount v. Larkin, 8 Bing. 122, per Tyndall, C. J., and cases in last note.

[46] Bain v. Case, 3 Car. & P. 496; Moody & M. 262; Foster v. Jackson Mar. Ins. Co., Edm. Sel. Cas. (N. Y.) 290.

[47] Grant v. King, 4 Esp. 175. But see cases following and those in last note, and opinions of courts.

[48] Palmer v. Marshall, 8 Bing. 79, 317; 1 L. J. Com. P., N. S., 19; Palmer v. Fenning, 9 Bing. 460; 2 Moore & S. 624.

[49] Earl v. Shaw, 1 Johns. Cas. (N. Y.) 314.

[50] Waterstein v. Columbian Ins. Co., 3 Rob. (N. Y.) 523.

would necessarily follow that if the preparation for the voyage is entirely suspended, that the case would be within the principle of the rule above given. If a policy be "at and from" a named port, the fact that the vessel is undergoing extensive repairs will not prevent the risk from attaching in port.[51] The last point, however, involves the question whether the warranty of seaworthiness is to be implied under time policies, which will be considered hereafter, and the question of delay in commencing the voyage will also be more fully considered hereafter under the head of "deviation."

§ 1495. Attachment of Risks—Sailing on Voyage—Departure.—The least locomotion with readiness of equipment and clearance, intending to sail on her voyage, satisfies a warranty to sail.[52] The moment a ship quits her moorings in readiness for sea, or in complete preparation for her voyage, intending to sail, she has sailed on her voyage within the meaning of that term,[53] even though she is afterward stopped by head winds,[54] or is detained by some subsequent occurrence.[55] But the ship must sail on the voyage insured, and must not only have broken ground, but on or before the day must be so far in a state of complete preparation and fitness for the performance of her voyage that nothing remains to be done afterward as to the commencement of it, and she must intend to at once prosecute her voyage without further delay.[56] But the fact that a vessel so fitted is moving down a river does not necessarily determine that she has sailed on her voyage; the quo animo de-

[51] McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170.

[52] Union Ins. Co. v. Tyson, 3 Hill (N. Y.), 118; Nelson v. Salvador, Moody & M. 309.

[53] Bowen v. Merchants' Ins. Co., 20 Pick. (Mass.) 275; 32 Am. Dec. 213, per Cowen, J.

[54] Bowen v. Merchants' Ins. Co., 20 Pick. (Mass.) 275; 32 Am. Dec. 213.

[55] Pettigrew v. Pringle, 3 Barn. & Adol. 514, per Lord Tenterden.

[56] Pettigrew v. Pringle, 3 Barn. & Adol. 514, per Lord Tenterden; Lang v. Anderson, 3 Barn. & C., per Lord Tenterden; Bowen v. Hope Ins. Co., 20 Pick. (Mass.) 275; 32 Am. Dec. 213, per Cowen, J.; Thellusson v. Staples, 1 Doug. 366, n., per Lord Mansfield; Cochran v. Fisher, 4 Tyrw. 424; 2 Cromp. & M. 581, per Lord Lyndhurst, C. B.; Fisher v. Cochran, 5 Tyrw. 496; 1 Cromp. M. & R. 809.

cides the point.[57] But in case of an insurance from A to B, warranted to have sailed before a certain day, the warranty applies to the voyage, and not to the risk in port, and the policy attaches on the subject in port, so that whether the vessel sailed before the day or not, a risk has been run, and the insurer is entitled to his premium.[58] Departure, however, imports an effectual leaving of the place behind, and if the vessel be detained or driven back, though she may have sailed, there is no departure.[59] Other points are, however, involved in the determination of these questions of what is a sailing and a departure, and they will be more fully considered under the subject of warranty to sail.

§ 1496. Attachment of Risk "at and from" Foreign Port.—In insurances "at and from" or "from her arrival" at a foreign port at which the vessel is expected to arrive, and which is the terminus a quo of a homeward voyage, the risk attaches at once from the moment of her first arrival "at" or within the specified port in a state of sufficient repair and seaworthiness to enable her to lie there in safety or reasonable security till she is properly prepared and equipped for her voyage, and the risk continues there during her stay in port as long as the ship is preparing for the voyage insured. This rule, however, is subject to such modifications as may arise from an unreasonable delay in such port, from a construction of the policy showing an evident intent otherwise, and from the usages of particular trades.[60] And this rule is also qualified by the proviso that the ship must arrive within such time as not to materially increase the risk, as where an unreasonable delay in

[57] Dennis v. Ludlow, 2 Caines (N. Y.), 111.

[58] Hendricks v. Commercial Ins. Co., 8 Johns. (N. Y.) 1.

[59] Union Ins. Co. v. Tysen, 3 Hill (N. Y.), 118, per Cowen, J.; Moir v. Royal Exch. Assur. Co., 6 Taunt. 241; 4 Camp. 84; 3 Moore & S. 461.

[60] Seamans v. Loring, 1 Mason (C. C.), 127, and cases cited; Parmeter v. Cousins, 2 Camp. 235; Vallance v. Dewar, 1 Camp. 503; Haughton v. Empire Mar. Ins. Co., L. R. 1 Ex. 206; Bell v. Bell, 2 Camp. 475; Bird v. Appleton, 8 Term Rep. 562; Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10; 2 Am. Dec. 130, per Kent, J. (Mr. Parsons says the words of this judge are obiter); Camden v. Conley, 1 W. Black. 417;

arriving changes the character of the risk, as to a more dangerous season of the year, and this exception applies whether the delay be voluntary or involuntary.[61]

§ **1497. What is Sufficient Repair and Seaworthiness for Ship to Lie in Safety "at" Outport.**—It would necessarily follow that the converse of the proposition stated under the last section is true, and that the policy will not attach if the ship arrives at such foreign port in so crippled a condition, or so badly wrecked, that she cannot lie there in safety or reasonable security to properly prepare and equip for her voyage.[62] By the term "seaworthiness," as used in the last section, applied to the ship in the connection there stated, is meant a state of seaworthiness commensurate with her then risk, and condition consistent with the ship's then security in the specified port. A state of repair and equipment "at" such a port may be sufficient, although it would be unseaworthiness for the sea voyage. It may reasonably be assumed from the nature of the thing that repairs may probably be necessitated upon the ship's arrival at such specified port; a necessity for repairs and some delay for that purpose to put her in a fit condition to undertake her voyage being events unavoidably contemplated under every such contract for insurance.[63] Thus, a

Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Stone v. Marine Ins. Co., L. R. 1 Ex. D. 81; Motteux v. London Assur. Co., 1 Atk. 545; De Wolf v. Archangel M. Ins. Co., L. R. 9 Q. B. 451; Kemble v. Bonne, 1 Caines (N. Y.), 75; Smith v. Steinbach, 2 Caines (N. Y.), 158; Taylor v. Lowell, 3 Mass. 331. And see sec. 1018 herein, and secs. 1498, 1500, post.

[61] DeWolf v. Archangel M. Ins. Co., L. R. 9 Q. B. 451, relying upon Hull v. Cooper, 14 East, 472; Mount v. Larkins, 8 Bing. 108, 122; Vallance v. Dewar, 1 Camp. 501, and other cases.

[62] Parmeter v. Cousins, 2 Camp. 257, per Lord Ellenborough, and cases cited in last note. See, also, Shaw v. Felton, 2 East, 109; Hommeyer v. Lushington, 15 East, 46.

[63] Annan v. Woodman, 3 Taunt. 299; Forbes v. Wilson, reported in 1 Marshall on Insurance, ed. 1810, *155; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Smith v. Surridge, 4 Esp. 25; Taylor v. Lowell, 3 Mass. 331, per Sewall, J.; Abithol v. Burston, 6 Taunt. 464; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227, per Shaw, C. J.; Parmeter v. Cousins, 2 Camp. 257; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184. And see sections as to warranty of seaworthiness.

policy on a ship "at and from a port" will attach although the ship be at the time undergoing extensive repairs in port, so as to be utterly unseaworthy, in the general sense, for a voyage.[64] The safety required is a physical safety from the perils insured against, a freedom from political danger not being necessitated.[65]

§ 1498. Whether Risk Attaches upon First Arrival "at" or after the Vessel has been Moored Twenty-four Hours, etc.—Where a vessel insured "at and from" a foreign port has not been lying in port, but is expected to arrive, and the homeward risk is preceded by the risk under the outward policy, which is to continue after the ship's arrival for either a specified number of days or until she is moored twenty-four hours in safety, the question has been raised whether the homeward policy attaches immediately upon the ship's first arrival "at" or within the place, or not until the ship has been moored twenty-four hours in safety. The true rule undoubtedly is that above stated by us.[66]

§ 1500. Same Subject—Cases and Opinions of the Courts.—The case of Garrigues v. Coxe[67] holds that the home-

[64] McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 184.

[65] Bell v. Bell, 2 Camp. 475, per Lord Ellenborough.

[66] Section 1496, herein. Mr. Marshall says that in such cases "the risk begins from the first moment of her [the ship's] arrival at the place specified, and the words 'first arrival' are implied and always understood in policies so worded": 1 Marshall on Insurance, ed. 1810, *262. Mr. Arnould declares that the risk "commences immediately on her first arrival at such port, and continues during the whole time that she remains there in a course of preparation for the voyage insured," and this rule remains unchanged in Mr. Maclachlan's edition of 1887 of Mr. Arnould's work: 1 Arnould on Marine Insurance, Perkins' ed. 1850, 448, *444; 1 Arnould on Marine Insurance, Maclachlan's ed., 1887, 406, 407. Mr. Phillips says: "In insurances on a vessel 'at' a port, the risk generally commences from the time of its being there": 1 Phillips on Insurance, 3d ed., 506, sec. 932. Mr. Parsons says: "If the policy on the homeward voyage is stated to be in continuance of the policy on the outward, it would certainly take effect on the termination of the outward, but perhaps not otherwise": 2 Parsons on Marine Insurance, ed. 1868, 46. Emerigon, however, declares that the ship can never perish outward and inward, although the rule is otherwise in regard to the goods: Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 20, pp. 592-94.

[67] 1 Binn. (Pa.) 592; 2 Am. Dec. 493.

ward risk in such cases begins only when the vessed has been moored twenty-four hours in safety. This was, however, a case at nisi prius. Lord Hardwicke declares in Motteux v. London Assurance Company,[68] that the words "first arrival" are always implied and understood in such insurances. In Seamans v. Loring[69] Judge Story states that the homeward policy "at and from" a foreign port attaches from the ship's first arrival there.[70] In Vallance v. Dewar[71] the court says: "According to the general import of the words 'at and from,' the policy would attach upon the ship's first mooring in a harbor" at the place where the risk is to commence. In Patrick v. Ludlow[72] Mr. Justice Kent places the time of the attachmene of the risk on the ship in these cases "from the time of her arrival" in such foreign port.[73]

[68] 1 Atk. 545.

[69] 1 Mason (C. C.), 127.

[70] Haughton v. Empire Mar. Ins. Co., L. R. 1 Ex. 206. The risk in this case was under a policy "at and from" a foreign port, and the point was raised that the policy did not attach until the vessel had been safely moored within the harbor. It was nevertheless declared by the court that risk on the ship commenced on her first arrival in port, and that the first arrival need not be identical with the mooring in good safety named in outward policies, since the terms in one contract could not be construed by reference to another not referred to. The cases relied on are Parmeter v. Cousins, 2 Camp. 235; Bell v. Bell, 2 Camp. 475; Motteux v. London Assur. Co., 1 Atk. 545.

[71] 1 Camp. 503.

[72] 3 Johns. Cas. (N. Y.) 10.

[73] Criticised in 2 Parsons on Marine Insurance, ed. 1868, 46, as an opinion altogether obiter. It is also declared in another case that if the ship has once been "at" the outward port or terminus a quo of the homeward voyage in such good physical safety as to admit of repairs, it is sufficient: Bell v. Bell, 2 Camp. 475, cited in 1 Arnould on Marine Insurance, Perkins' ed. 1850, 448, *443, *444; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 406; Parmeter v. Cousins, 2 Camp. 235, per Lord Ellenborough. Mr. Parsons criticises the opinion of Mr. Justice Kent (2 Parsons on Marine Insurance, ed. 1868, 46 n, 47 m) in Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10, above noted, as "altogether obiter," saying "The question before the court was distinct from this." He also says of that in Motteux v. London Assur. Co., 1 Atk. 545, above noted, "The chancellor did not intend to distinguish between the moment of arrival and the being moored twenty-four hours."

§ 1501. Same Subject—Attachment and Duration of Risk "at and from" Island, etc.[74]—In case of an insurance on a ship "at and from" an island or district with several ports, such as the West Indies, the outward risk to continue until the ship has been moored twenty-four hours in safety, the homeward policy will attach upon the expiration of the outward; that is, after she has been moored twenty-four hours in safety after her voluntary arrival at her first port of discharge, even though at that time she has not discharged all her outward cargo, and although she thereafter goes from port to port of the island. In this case it appeared, however, that the ship was bound to the island generally, and by the course of trade, to touch at the several ports there to discharge and take in cargo, and the decision was based upon evidence of the custom of merchants as to the time when the outward risk ended, and the verdict was found by a special jury that the risk ended as above stated.[75] But in a similar case under a policy "at and from" Georgia to Jamaica and "till moored twenty-four hours in safety," Lord Kenyon said, the risk on the ship ceased on her being moored twenty-four hours within the first port of the island for the purpose of unlading.[75a]

§ 1502. Usage may Suspend Attachment of Risk "at and from" beyond Time of Ship's First Arrival.—A notorious and established usage of a particular trade, presumptively within the knowledge of both parties, may suspend the attachment of a risk "at and from" beyond the time of the ship's first arrival, so that in such case the risk will only commence on the homeward voyage when the vessel begins preparations therefor. This is illustrated by the case of an insurance upon ship, freight, and cargo at and from Newfoundland to a port in Europe, it being an established usage of the Newfoundland trade for vessels, after arrival there and finding no cargo ready, to be employed in fishing upon the banks, or in making

[74] See sec. 1524, herein.

[75] Camden v. Cowley, 1 W. Black. 417. See opinions of Lord Mansfield and Wilmot, J.; Leigh v. Mather, 1 Esp. 412, per Lord Kenyon.

[75a] Leigh v. Mather, 1 Esp. 412, per Lord Kenyon.

intermediate trading voyages to some adjacent port, before they begin to take in their homeward cargo. Here the risk is not determined by the delay or intermediate voyage, but is suspended as to its attachment, by the usage of which the insurers are bound to take notice until the vessel begins to prepare for the voyage insured, and the underwriters in such case are not liable for any antecedent loss. It also appeared in this case that it was a custom to cover the ship by a separate insurance during such fishing or intermediate voyages.[76] But in case of an insurance "at and from" any ports in Newfoundland, and the vessel leaves the port there and goes to the banks and fishes for several days, the insured cannot recover for a loss thereafter sustained.[77]

§ **1503. Stipulation that Risk Commence "at and from" on Termination of Cruise and Preparing for Voyage.** An insurance may stipulate that the adventure shall begin on the termination of the cruise and preparing for her homeward voyage, the policy being "at and from" a specified port, "or any other port or ports" on a certain coast, and where in such case the master sent a boat from the vessel lying off said coast to the specified port to see if he could obtain a cargo, but was unsuccessful, and sailed for another port on said coast for a cargo, and the vessel was lost, the homeward risk was held to have attached, and a preparation for the voyage to have been commenced.[78]

§ **1504. Opinions of the Courts as to Attachment of the Risk on the Preceding Cases.**—Lord Ellenborough says: "While the ship remains at the place, a state of repair and equipment may be sufficient which would constitute unseaworthiness after the commencement of the voyage. But while in port she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage; she must have once been at the place

[76] Vallance v. Dewar, 1 Camp. 503. See Ougier v. Jennings, 1 Camp. 505, n.

[77] Way v. Modigliani, 2 Term Rep. 30.

[78] Lambert v. Liddard, 5 Taunt. 480.

in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." [79] Lord Kenyon says: "Where a ship is insured to a particular port of delivery, if forced into a different port by stress of weather, where she discharges a part of her cargo and then proceeds to her port of delivery, I am of the opinion that the policy will remain good. But where a ship, under a general policy to a port and until moored twenty-four hours, came to another port, and there voluntarily remained and discharged part of her cargo, such action will put an end to the policy, whether on ship or goods." [80] In Motteux v. London Assurance Company[81] Lord Hardwicke says: "In a former case before me it was debated whether the words 'at and from Bengal to England' meant the first arrival of the ship at Bengal; and it was agreed that the words 'first arrival' were implied and always understood in policies." In Seamans v. Loring[82] Story, J., says: "The true construction of the words 'at and from' in a policy must in a measure depend on the state of things at the time of the insuring. If the ship is at that time in a foreign port or expected to arrive at such port in the course of her voyage, the policy, by the word 'at,' will attach upon the vessel and cargo from the time of her arrival there. If, on the other foot, the vessel has been a long time in such port without reference to any particular voyage, the policy will only attach from the time that preparations begin to be made with reference to the voyage assured." In Patrick v. Ludlow[83] Radcliff, J., says: "A policy on goods for any voyage cannot attach until they leave the shore to be put on board. Here the insurance is expressed to be 'at and from S.,' and yet, as in other policies, describes the adventure to begin from the loading thereof on board. It manifestly cannot apply to a period during which an intermediate voyage was performed. That voyage cannot, therefore, constitute a deviation."

[79] Parmeter v. Cousins, 2 Camp. 235.
[80] Leigh v. Mather, 1 Esp. 412.
[81] 1 Atk. 545.
[82] 1 Mason (C. C.), 127.
[83] 3 Johns. (N. Y.) 10.

§ 1505. Meaning of the Word "Port" Generally—"Port Risk."—The meaning of the word "port" is generally accepted to be synonymous with the word "harbor," in the sense that it is a place where ships may be safe from the perils of the ocean; a space of water inclosed by land within which a vessel may be sheltered from storms. But this meaning is not exclusive, for it may be controlled by the terms of the policy, by the peculiar sense in which it is used, or by commercial usage, and is generally to be taken in reference to the subject matter to which it is applied. It may be applied to places on a coast where there are no harbors, or to a certain named port, there being no actual port or harbor there. In such cases it may mean only a road or anchorage place for the purpose of loading and unloading cargoes, and may extend to an exposed and open roadstead; such a construction being warranted by the facts and the peculiar sense in which the word "port" is used.[84] Thus a vessel insured "at and from" a place has been held "at" the place, so that the risk would attach when she lay at an island nine miles below the town, such island being deemed a port of such place.[85] Again, in case of an insurance "to any port in the Baltic," the Baltic may be shown to comprehend, as generally used and understood, the gulfs and inlets which communicate with the sea, and might include the Gulf of Finland, if so proven.[86] So a policy issued upon a vessel at and from Sydney, C. B., to St. John, will attach

[84] De Longuemere v. New York Firemen's Ins. Co., 10 Johns. (N. Y.) 120; Payne v. Hutchinson, 2 Taunt. 405, n.; Sailing-Ship Garston v. Hickie, 15 Q. B. Div. 580, per Lord Esher; Uhde v. Walters, 3 Camp. 16; Neilson v. De La Cour, 2 Esp. 619; 1 Green, 534; Sea Ins. Co. v. Gavin, 2 Dow & C. 124; Robertson v. Clark, 1 Bing. 445; 8 Moore, 622; Cockey v. Atkinson, 2 Barn. & Ald. 460; Hancox v. Fishing Ins. Co., 3 Sum. (U. S.) 134; Fay v. Alliance Ins. Co., 16 Gray (Mass.), 455; Constable v. Noble, 2 Taunt. 408; Osacar v. Louisiana State Ins. Co., 17 Mart. (La.) 386; Gray v. Harper, 1 Story (C. C.), 574; Cole v. Union Mut. Ins. Co., 12 Gray (Mass.), 501; 7 Am. Dec. 609; Mixon v. Atkins, 3 Camp. 300; Hull Dock Co. v. Browne, 2 Barn. & Adol. 43; Brown v. Tayleur, 4 Ad. & E. 241; Birch v. De Peyster, 4 Camp. 385; Van Baygen v. Barnes, 9 Ex. 253; 1 Duer on Insurance, ed. 1845, 281, sec. 74. See cases under next section.

[85] Bell v. Marine Ins. Co., 8 Serg. & R. (Pa.) 98.

[86] Uhde v. Walters, 3 Camp. 16.

when the vessel calls at Sydney for orders, though she only comes into waters known on charts and to practical men as "Sydney Harbor," which is ten miles distant from the harbor of Sydney proper, and five miles distant from that of North Sydney.[87] And it is held to have been a proper question for the jury whether the words "New York harbor," under the particular facts of the case, included Tarrytown, on the Hudson River, about twenty-nine miles north of New York.[88] So when the policy contains a clause that the insurers take no risk in port, but sea risk, the term "port" is not to be confined to the port of departure or discharge, but is used in contradistinction to the high seas, and refers to any port into which the vessel may of necessity enter during the voyage insured.[89] And the term "port risk," under New York policies, is held to mean the risk upon a vessel while lying in port and before departure upon another voyage.[90] Where a vessel was warranted in port on a certain day, and was insured from Hamburg to Vigo, and was in the port of Cuxhaven, outside of the port of Hamburg, about ninety miles below, on said day, the risk was held not to have attached.[91] And the term "port risk" is a technical term, the meaning of which, as used in marine policies, may be proven by expert evidence.[92] But evidence is held inadmissible of a custom for vessels to go to two ports in the same island where the terms of the contract are clear, and insure "to a port in Cuba, and at and from thence to a port of advice in Europe." [93] So also, an insurance "at and from" her port of lading excludes a construction that lading at two different places was intended, although located in the same bay within a few miles each of the other, the contract clearly evidencing that only one port was intended.[94]

[87] Troop v. St. Paul F. & M. Ins. Co., 33 N. B. 105.

[88] Petrie v. Phœnix Ins. Co. (N. Y. C. A. 1892), 43 N. Y. St. Rep. 478; 30 N. E. Rep. 380; 45 Alb. L. J. 419.

[89] Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 9.

[90] Slocovich v. Orient M. Ins. Co., 10 Cent. Rep. 456; 3 Mass. (L. ed.) 576; Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; 40 N. Y. Super. Ct. 417.

[91] Colby v. Hunter, 1 Moody & M. 81; 3 Car. & P. 7.

[92] Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; 40 N. Y. Super. Ct. 417.

[93] Hearne v. Marine Ins. Co., 20 Wall. (U. S.) 488.

[94] Brown v. Tayleur, 4 Ad. & E. 241.

§ 1506. Duration of Risk—Time Policies "at Sea"—"On a Passage."—In insurances on time it is frequently stipulated that if the ship be "at sea" or "on a passage" when the period for limitation for the duration of the risk expires, that the insurance shall continue until her arrival at her port of discharge or port of destination. In construing these terms, reference must necessarily be had to the connection in which they are used, and the evident intent of the parties to be ascertained by the language employed, together with such other aids to construction as may be legally available. If a vessel has sailed on or commenced her voyage, she would presumably seem to be at sea from the commencement to the termination of that voyage. In connection with this question, the point considered under the last section may be important. As will be seen, however, there is some disagreement between the courts as to the effect of these words. Thus, where an insurance is upon a ship for a specified time, and if she should be at sea at the expiration of said period, the insurance to continue at the same rate of premium until she reaches her port of destination, the vessel is held to be at sea, within the intent of the policy, if at the expiration of the time she is lying ready to sail in a river leading from a port twenty-five miles inland, but cannot get down nor sail till after the year, because of headwinds and a heavy sea, and the insurers are liable for her damage after sailing from the river after the year, there being no fraud nor want of diligence.[95] But where a vessel was insured for a year by a policy containing a provision that if she was "on a passage at the end of the term" the risk should continue until her arrival at her port of destination, and she sailed from the Chincha Islands and put into Callao, on the mainland, there being no other port of entry for the Chinchas, for the necessary clearance, water, and crew for her further voyage, and while there the year expired, it was held that she was not "on a passage" within a meaning of the

[95] Union Ins. Co. v. Tyson, 3 Hill (N. Y.), 118. The court cites and relies upon Bowen v. Merchants' Ins. Co., 20 Pick. (Mass.) 275; 32 Am. Dec. 213, a case directly in point, being based upon substantially similar facts, and which also holds that the vessel is "on a passage" under such circumstances.

policy.[96] So in a similar case the vessel was held not "at sea" at the end of the year, but had arrived at her "port of destination," where she had anchored between two of those islands for want of a port before the term expired, and took in her cargo in boats, obtaining her clearance at Callao, and sailing after the year. The rule stated was that the risk in such cases will terminate when the ship at the end of the year is, or afterward first arrives, at some port to which she is sent to take in cargo, and this though the place is not an open port by law, but an open roadstead, with no haven, harbor, or customhouse, and is not her final destination.[97] In New York, the vessel was held not "at sea" under a like policy, the risk to continue until her arrival at her port of destination, in a case where she was detained undergoing repairs in a foreign port, although not her final port, at the expiration of the specified time, and was subsequently lost on her return passage. In this case no port of destination was named.[98] In another case the risk was to continue if "on a passage" at the end of the term until the ship's arrival at her port of destination, and until arrived and moored at anchor twenty-four hours in safety; the vessel was on a charter to the French marine to proceed directly to Woosung, near Shanghai, there to receive orders whether to discharge at Woosung or to proceed farther; she was on a passage at the end of the term. She arrived at the

[96] Washington Ins. Co. v. White, 103 Mass. 238; 4 Am. Rep. 543.

[97] Cole v. Union Mut. Ins. Co., 12 Gray (Mass.), 501; 74 Am. Dec. 609. Here the court said: "Although there was no customhouse, and no clearance could be obtained there, she was, in reference to condition in policy as to the extension of same, not 'at sea,' and not entitled to the benefit of the extension of the time secured thereby to vessels 'at sea' at the end of the year"; Tilton v. Tremont Ins. Co., 12 Gray (Mass.), 519, and note. Although the last three cases were decided in Massachusetts, yet in another case in that state, where the risk was to continue at an agreed premium until she reached her port of discharge if the vessel was at sea when the year expired, it was held that, being in a foreign port at the expiration of the term, having been captured and carried thither against the will of the master, she was still "at sea" within the meaning of the policy: Wood v. New England Ins. Co., 14 Mass. 31; 7 Am. Dec. 182.

[98] American Ins. Co. v. Hutton, 7 Hill (N. Y.), 321; affirming 24 Wend. (N. Y.) 330.

mouth of the Shanghai river within the port of Woosung, and was directed to await there for further orders, in accordance with the terms of the charter-party. She was lost at that place after the term had expired, and it was held that Woosung was the port of destination, and the risk ended when she had been moored in safety there twenty-four hours.[99] Again, the underwriters were held discharged under a time policy for twelve months ending November 10, 1838, with liberty of the globe, and if "at sea" at the end of the time limit, the insurance to continue at the same rates until her arrival at her port of destination in the United States, and while on her voyage to England she encountered a gale in December, 1838, and sustained damage. The decision was based upon the point that the underwriters were not liable unless she was on her voyage to the United States at the time of sustaining the loss.[100]

§ 1507. Attachment Risk "at and from" Vessel Lying Long in Foreign Port or Stated to be There in Safety—Where She Now is.—In cases where an insurance is effected "at and from" some foreign port in which the vessel may have been lying a long time, without reference to any particular voyage, the risk attaches from the time the ship begins to make preparations for the voyage insured, or when some act is done toward equipping her for the voyage, or on the day on which she is stated to have been in safety in the port from which she is to sail, and in case the ship is stated to have been at the port on a certain day, it means that she was there in safety. If the loss or injury occurs before that day, the underwriters are not liable, for the risk has not commenced.[101] So the words "where she now is," following the words "at and from the port of Gibraltar," will amount to a warranty that the ship is there at said port in safety.[102]

[99] Wales v. China Mut. Ins. Co., 8 Allen (Mass.), 380.

[100] Eyre v. Marine Ins. Co., 6 Whart. (Pa.) 247. See s. c., 5 Watts & S. (Pa.) 116.

[101] Seamens v. Loring, 1 Mason (C. C.), 127, per Story, J., and cases cited; Kemble v. Bonne, 1 Caines (N. Y.), 75, 79, per the court.

[102] Callaghan v. Atlantic Ins. Co., 1 Edw. (N. Y.) 64.

§ 1508. Homeward Policy "at and from"—General Designation of Ports—Case of Island or District.—In insurances "at and from" it may be evident that it was the intent of the parties not to confine the limits of the risk to a specific port or place, but that the protection of the policy should be extended to the ship in sailing from one port to another for the purpose of loading. Thus, insurances "at and from" an island or district with several ports is not the same as a policy at and from a port. The general words of the former may evidence an intent to license the use of all the different ports of the island or country named, and gives the ship a liberty of going from one port to another in the island or district for the purpose of loading or completing her cargo.[103] But where the insurance was on freight, the description being to a port on the north side of Cuba, with liberty to a second port thereon, the risk was held limited to a second port on the side specified, viz., the north side.[104] The terms of the policy may be such as to evidence an intent that the risk may attach "at" one of two ports in the alternative, at the insured's election; thus, in case of a policy "at and from either of" two ports,[105] or "at and from" a port or ports or ports and places, which would contemplate a sailing to several ports or places to take in cargo. The question, however, in cases of the character of the above is dependent largely upon the construction of the contract.[106] And in certain cases of insurances upon a particular voyage,

[103] Dickey v. Baltimore Ins. Co., 7 Cranch (U. S.), 327, relying upon Camden v. Comley, 1 W. Black, 417; Bond v. Nutt, Cov. 601; Thallason v. Ferguson, Doug. 346, per Lord Mansfield, who said that under an insurance "at and from" such a place as Guadaloupe or Jamaica, the word "at" comprises the whole island, and under that word the ship is protected in going from port to port round the coast of the island; Thelluson v. Staples, Doug. 352, n. See, also, Brown v. Tayleur, 4 Ad. & E. 248, per Patterson, J.; Constable v. Noble, 2 Taunt. 405; Inglis v. Vaux, 3 Camp. 437; Lambert v. Liddard, 5 Taunt. 479; Leigh v. Mather, 1 Esp. 412.

[104] Nicholson v. Mercantile etc. Ins. Co., 106 Mass. 399.

[105] Vandervoort v. Smith, 2 Caines (N. Y.), 155. So used in Gardner v. Col. Ins. Co., 2 Cranch (C. C.), 473 (a policy on goods).

[106] See Brown v. Tayleur, 4 Ad. & E. 241; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 452, *448; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 410; 1 Phillips on Marine Insurance, 3d ed., 525, et seq., secs. 958, 959.

governed by a custom as to a course of trade, the meaning of general words, such as "in all ports and places," etc., in policies "at and from" may be governed, within the reasonable import of the terms of the insurance, by the general usage of merchants with reference to that particular trade or voyage, for every underwriter is bound to know the usage of the trade to which his insurance relates.[107]

§ 1509. Homeward Policy "at and from"—Specific Designation of Port or Place.—In cases where the homeward policy is "at and from" a port or place specifically designated, or "at and from" the ship's port of lading in an island or district having several ports, it seems to be the rule that the intent evidenced by such specific designation will control and limit the risk taken by the insurer, and will exclude other ports or places, restricting the risk to one particular place.[108] In such case Mr. Arnould says: "It is fair to conclude that the underwriter, with a view of limiting his risk, confined it to the ship while she was taking in her cargo at one specific place or harbor town." [109]

§ 1510. Attachment of Risk "at and from" Foreign Port—Ownership Acquired while Vessel Lying in Port. If under a policy "at and from" a foreign port at which the vessel has been lying the ownership is acquired while the vessel is lying in port, and subsequently to the time that preparations are begun to be made with reference to the voyage insured, the policy will attach only from the time such ownership is acquired.[110] So the risk was held to attach from the time of purchase at Trinidad, in case of an insurance "at and from" that place.[111]

[107] Salvador v. Hopkins, 3 Burr. 1707.

[108] Smith's Mercantile Law, Am. ed., 404; Brown v. Tayleur, 4 Ad. & E. 241, per Patterson, J.

[109] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 452, *448. See 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 410. So much of the text as is here quoted from Perkins' edition is omitted, however, in Maclachlan's edition. See chapter on "deviation," herein.

[110] Seamans v. Loring, 1 Mason (C. C.), 127, per Story, J.

[111] Steinbach v. Rhinelander, 3 Johns. Cas. (N. Y.) 269.

§ 1511. "At and from" any One of Several Ports—Voyage from One Port to Another before Risk Attaches. If an insurance be "at and from" any one of several ports of departure to a port of destination, and before the ship's final departure on the voyage insured she undertakes a voyage from one of these several ports to another, the voyage insured does not attach so as to protect the prior voyage.[112]

§ 1512. Attachment of Risk "from" a Port.—In insurances on a ship "from" a port, the rule as to the time of the commencement of the risk differs from that which obtains in cases of insurances "at and from" a port, since in the former case the risk in port is not covered, the risk only commencing when the ship actually sails on her voyage, and the insurers are not liable for her loss or damage occurring before she so sails;[113] and under such an insurance the risk may commence "from" a port by the vessel taking in part of her cargo there and completing her loading at an outport, according to usage in case of vessels of like burden.[114] The attachment of a risk from a port, said risk being part of an entire risk, may be postponed by a justifiable intermediate voyage.[115]

§ 1513. Attachment and Duration of Risk—Entirety of Risk.—In determining how far the risk is entire, consideration must always be given to the fact that the voyage insured is a legal term dependent upon the stipulations of the contract. The evidence of the intent as to the duration of the risk must be looked for in such stipulations, as qualified by the

[112] Sellar v. McVickar, 1 Mer. Rep. 23, cited in 1 Marshall on Insurance, ed. 1810, *323, *324. See sec. 1488, herein.

[113] Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; Bond v. Mitt, Cowp. 607; Pettigrew v. Pringle, 3 Barn. & Adol. 514; Mey v. Smith Car. Ins. Co., 3 Brev. (S. C.) 329; Union Ins. Co. v. Tyson, 3 Hill (N. Y.), 118; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 343, *337, *338, 447, *442; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 369, 404; 1 Marshall on Insurance, ed. 1810, 261 a; 2 Parsons on Marine Insurance, ed. 1868, 48; 3 Kent's Commentaries, 5th ed., 307, n. a. See sec. 1495, herein, as to what constitutes sailing on voyage; and see, also, sec. 2082, post, as to warranty to sail.

[114] Mey v. South Carolina Ins. Co., 3 Brev. Const. (S. C.) 329.

[115] Driscoll v. Passmore, 1 Bos. & P. 200.

expressed termini; that is, the specific designation of the times when or places where the risk commences and terminates, such times and places being the extremes. If in the voyage insured the terminus a quo and the terminus ad quem are expressly specified as the two extremes of the risk, and the premium is entire, there is a presumption that the risk is entire, covering the entire voyage insured between the termini; the insurance in such case is only a single insurance, and ships are thus often insured for the round voyage out and home, and the voyage insured is one entire and indivisible, although her outward voyage and homeward voyage are in reality separate and distinct passages, and the underwriter is liable under such policy, the risk being entire for the entire voyage so insured, no matter how many separate and distinct passages or intermediate voyages the ship is by the terms of the policy permitted to make. But if it is evident from the contract that the risk was intended to be severable and not entire, it will be so held.[116] "When a ship is insured both outward and homeward for one entire premium, this, with reference to the insurance, is considered but as one voyage, and the terminus a quo is also the terminus ad quem."[117] Thus, in case of an insurance at and from Boston to Archangel and back to Boston, the risk was held entire.[118] So in case of a policy on ship and cargo at and from A to B during her stay and trade there, thence to her port or ports of discharge in C, and at and from thence back to A, the contract was held entire.[119] And if the risk has once commenced upon a policy at and from such a port to any other port or place whatsoever for twelve months, at a lump premium, the risk is entire.[120] In this connection the distinction should be observed between the voyage insured and the route or voyage of the ship. In the former case the termini are expressed, but the route or prescribed course of the voy-

[116] Emerigon on Insurance, Meredith's ed. 1850, c. iii, sec. 2, *53; c. xiii, sec. 4, p. 549, et seq.; Waters v. Allen, 5 Hill (N. Y.), 421. See sec. 1420, herein, and cases.

[117] 1 Marshall on Insurance, ed. 1810, *247.

[118] Homer v. Dorr, 10 Mass. 26.

[119] Bermon v. Woodbridge, 2 Doug. 781.

[120] Tyrie v. Fletcher, Cowp. 666.

age of the ship is implied.[121] And, as we have already stated, the voyage insured may be changed or abandoned, so that the risk may never be incepted, or being abandoned, may terminate;[122] but the route may in several cases be changed or altered without the voyage insured being so, and the voyage insured may be entirely broken up without the route being departed from. So a ship may be chartered for a round voyage out and home, while the outward and the homeward voyage may be two distinct voyages insured.[123]

§ 1514. The Words "thence" or "from" Used in Reference to Intermediate Ports.[124]—Where an insurance was on a vessel "at and from" N. to H., "from thence to" B. and back to N., the rule was deduced that the words "thence" or "from," when used in reference to the intermediate ports of a voyage, are not terms of exclusion, but descriptive of the voyage, and that the word "at" is not necessary to cover the risk on the vessel at an intermediate port, but that the policy covered the vessel while stopping at any of the intermediate ports described in the policy.[125]

[121] Emerigon says: "The route is the way that one takes to make the voyage insured est iter viaggii. . . . . The word 'iter' is ordinarily employed by our authors to designate the route and direction of the voyage insured, rather than to designate the voyage itself": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 5, p. 550, sec. 3, p. 548.

[122] Section 1488, herein.

[123] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 4, p. 548; 1 Arnould on Marine Insurance, Perkins' ed. 1868, 339-42, *333-36; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 365-70, and cases above noted under this section. It is also provided by the Ordonnance of 1681 that, "If the voyage is designated by the policy, the insurer runs the risk of the entire voyage, on condition always that if its duration exceeds the time limited, the premium shall be increased in proportion": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 1, p. 534, sec. 13, p. 573, et seq. This rule, being dependent upon the Ordonnance, has never obtained in England or the United States.

[124] See chapter on "deviation."

[125] Bradley v. Nashville Ins. Co., 3 La. Ann. 708; 48 Am. Dec. 465. See Ashley v. Pratt, 16 Mees. & W. 471; affirmed 1 Exch. 257; 17 L. J. Ex. 135; and examine Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408.

§ 1515. "At and from" to a Port Named and "a Market."[126]—If a vessel is insured "at and from" a specified port to a specified port "and a market" in the West Indies, or a named island of the group, the words "and a market" permit the insured to take his vessel back and forth, bona fide, from port to port of the islands or island, in search of a market;[127] and if different ports are permitted to be visited to dispose of the cargo, a bona fide delay will be allowed for the purpose of procuring a price limited to a reasonable extent.[128]

§ 1516. Commencement of Voyage Insured to Specified Port With Liberty to Call at, etc.—A voyage insured to a port named, with liberty to call at other places, must appear to have been commenced either as a voyage to the port named, or to the port named by way of the place at which liberty has been given to call; as in case of an insurance on a ship and outfit for a voyage from New South Wales to Otaheite, during her stay and back, with leberty to call at Macquarrie Island and all other ports for South Sea fishing and sailing, the voyage must have been commenced directly to Otaheite, or there by way of Macquarrie Island, and there being no evidence of any intention to go to Otaheite, there can be no recovery, even though the vessel sailed directly for Macquarrie Island with intention to proceed to the South Sea Islands, and is lost off Macquarrie Island, about two thousand miles from Otaheite.[129]

SUBDIV. II. Continuance and Termination of Risk—The Ship.

§ 1523. Continuance of Risk—Liberty to "Touch and Stay," etc.—Intermediate Voyage—Usage of Trade.—A liberty "to touch and stay" or "to touch, stay, and trade" may, by a notorious and established usage of trade, cover, and the

[126] See chapter on "deviation."

[127] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303; 28 Am. Dec. 245; Maxwell v. Robinson, 1 Johns. (N. Y.) 333. See Nelson v. De La Cour, 2 Esp. 619.

[128] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383.

[129] Lord v. Robinson, 6 L. J. K. B., 212. See next section.

risk continue during, an intermediate voyage, whether the liberty be to touch and stay at "any ports or places" or "any port or place,"[130] although a liberty "to touch at any" ports or places gives a license to stop only at ports or places in the usual course of the voyage, and the liberty to touch is strictly construed, and must be strictly adhered to to prevent a deviation.[131] And the ship, no liberty to touch and stay being given, must not, after having sailed on the voyage insured, make an intermediate voyage which is not in furtherance of the voyage insured, for such act will terminate the contract, unless said act be warranted by the usages of trade; for, as we shall note hereafter, it is necessary that the ship sail on the voyage insured and no other, direct from one of the termini to the other, and she is not permitted to stop at intermediate ports except by necessity or permission, or under the terms of the contract, or by established usage, and in certain other cases to be specified hereafter.[132] Again, a voyage from one port to another, stopping at an intermediate port to unload and reship the cargo in order to avoid confiscation, may be insured as a voyage from the first port to the last without mentioning the intermediate port.[133]

§ 1524. Termination of Risk on Ship to Island, with Liberty of Several Ports or to Port or Ports of Discharge.[134]—If an insurance is effected on a vessel to an island with liberty to touch and stay at "any ports or places

[130] Gregory v. Christie, 3 Doug. 419; Farquharson v. Hunter, this and the last case are reported in 1 Marshall on Insurance, ed. 1810, *273, *274; Salvador v. Hopkins, 3 Burr. 1707. See, also, chapter on "deviation."

[131] 1 Marshall on Insurance, ed. 1810, *275; citing Lavabre v. Wilson, Doug. 271; Still v. Wardell, 1 Esp. 610, per Lord Kenyon; Sheuff v. Potts, 5 Esp. 96, per Lord Ellenborough. See Murray v. Col. Ins. Co., 4 Johns. (N. Y.) 443. See chapter on "deviation."

[132] Coffin v. Newburyport Ins. Co., 9 Mass. 449; Millish v. Andrews, 2 Maule & S. 26; 5 Taunt. 495; Bottomly v. Borill, 5 Barn. & C. 210; Kettle v. Wiggin, 13 Mass. 68; Clason v. Simonds, 6 Term Rep. 533; Martin v. Delaware Ins. Co., 2 Wash. (C. C.) 254; Gardner v. Lenhouse, 3 Taunt. 16.

[133] Steinbach v. Col. Ins. Co., 2 Caines (N. Y.), 129.

[134] See secs. 1501, 1532, herein.

whatsoever," or to port or ports of discharge in a country, and the principal and ultimate object of the voyage insured is to dispose of the outward cargo, the outward risk will terminate at the first of those ports where the vessel has been moored twenty-four hours in safety, and discharges the bulk of her outward cargo, even though a small quantity of the cargo remains on board. Thus, in the case of an insurance on the ship "at and from Liverpool to Martinique and all or any of the windward and leeward islands, with liberty to touch at any ports or places whatsoever to take on board and land goods, stores," etc., and the vessel arrived at Martinique and discharged substantially all her outward cargo, that is, the great bulk thereof, only a trifling quantity remaining on board, with which she proceeded to and arrived to Antigua, but was afterward lost while she lay at said place waiting to procure a homeward cargo and to discharge the remnant of her outward cargo, the insurers on the outward voyage were held discharged;[135] and it is a question for the jury whether the outward cargo is substantially discharged at the port in question.[136] The rules as to insurance on the cargo in like cases will be considered hereafter.

[135] Upton v. Commercial Ins. Co., 8 Met. (Mass.) 605; Inglis v. Vaux, 3 Camp. 436. See Crowley v. Cohen, 1 W. Black, 417, per Lord Mansfield; Moore v. Taylor, 1 Ad. & E. 25; Leigh v. Mather, 1 Esp. 412, reported in 1 Marshall on Insurance, ed. 1810, *267.

[136] Upton v. Commercial Ins. Co., 8 Met. (Mass.) 605; citing Moore v. Taylor, 1 Ad. & E. 25. The question was left to the jury in Inglis v. Vaux, 3 Camp. 437. Emerigon says that in case of such insurances "the risk on the ship is terminated . . . . only after the cargo has been landed wholly or nearly so." In one of the cases relied on by him the risk was "out from Marseilles to the French islands in America, with leave to the captain to touch and make a port in all places and parts he might think fit, the insurers taking the risk as to the goods, etc., and for the hull . . . . until arrived at the French isles and landed the whole in safety," and the risk was held determined at Logane, where the sale of the cargo was completed, except "only a matter of one per cent on the entire cargo": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 18, p. 586, et seq. Mr. Arnould says that in cases of ships insured to a West India island, "the risk on the ship under the outward policy comes to an end immediately after she has been moored twenty-four hours in good safety at the one port where the great bulk of the outward cargo is substantially discharged, and it will not be considered as continuing

§ 1525. Insurance to Several Successive Ports of Discharge—Election of Port.—Where an insurance is to several successive designated ports or places of discharge, as from A to B and at and from B to C, the vessel may elect to go immediately to the final port, for she need not sail to all the ports, and if the insured intends to go to but one of the specified ports, that one is at his election; but if to more, then he must follow the order specified in the policy, without regard to whether that be the geographical order or not, and if the ship in such case sails from A, and is obliged to put into a port of necessity, she may go to the final port at once without stopping at B. Usage may, however, change the rule. If not named, then the relative geographical order must be followed.[137]

§ 1526. Continuance of Risk where Completion of Voyage Insured is Compelled to be Temporarily Delayed. The voyage insured may be accidentally delayed by unavoidable obstructions temporary in their nature, such as the blocking of a river or harbor approaches by ice. In such case, if the character of the obstruction is only temporary in its nature, and the intent is to prosecute to its completion the original voyage insured is never abandoned, and if it appears that necessary and proper measures are taken to that end, the

longer merely because a small portion of the outward cargo is still on board": 1 Arnould on Marine Insurance, Perkins' ed. 1850, 460, 463, *456-58, 441, *436, et seq., 465, *460, sec. 174; Arnould on Marine Insurance, Maclachlan's ed. 1887, 397, 418-23. Mr. Phillips says: "Where insurance is made to a port or ports, as to an island or district, with liberty to touch and trade at divers ports, or 'to the final port of discharge,' the risk will terminate when the whole cargo is discharged, or when the objects to the voyage to ports for the purpose of delivering cargo are so far accomplished that the delivery of the remainder at any ulterior port is no inducement with consideration to proceed thither . . . . the risk should continue upon the ship so long at least as the disposal of the outward cargo is the principal or substantial reason for proceeding to an ulterior port": 1 Phillips on Insurance, 3d ed., 628, et seq., sec. 963. See, also, 1 Marshall on Insurance, ed. 1810, *266, et seq.

[137] Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 264; Hale v. Mercantile Ins. Co., 6 Pick. (Mass.) 172; Marsden v. Reid, 3 East, 572; Beatson v. Haworth, 6 Term. Rep. 531. See Elliott v. Wilson, 7 Brown Parl. C. 459. See chapter on "deviation."

delay being necessitated by inability at the time to overcome such temporary obstacle, the risk will continue the whole time of such delay. But if the vessel, being prevented from entering her port of destination, turns away therefrom and seeks another port of discharge, from that moment the insurers are released, even though the ship goes to the nearest place of safety.[138] And the voyage insured may continue within the terms of the policy till stopped by ice or the closing of navigation, in which case the question whether it is so stopped may be for the jury.[139]

§ 1527. Risk Continues although Vessel be Compelled to Stop Without the Harbor by Municipal or Like Regulations — Quarantine.—If by the municipal regulations of the country the vessel is compelled to stop without her harbor or port of destination, in order to be examined, the risk is not thereby determined, but continues until the vessel is moored twenty-four hours in safety.[140] So if a ship is ordered to quarantine, even after being moored, but within the twenty-four hours, the risk nevertheless continues.[141] Emerigon says: "Arrival at lazarettos does not terminate the voyage"; and again: "A ship is put into quarantine . . . . ; the risk of the vessel is at the charge of the insurers until her entry into port."[142] Usage may, however, control when not inconsistent with the express terms of the policy. Thus, Gracie v. Marine Insurance Company[143] was a case resting "upon usage of ancient date and general notoriety" that the place of landing was the lazaretto, and that the landing would be made under the direction and control of the local authorities; the policy

[138] Brown v. Vigne, 12 East, 283; Parkin v. Tunno, 2 Camp. 59; 11 East, 22; Brown v. St. Nicholas Ins. Co., 61 N. Y. 332; Blackenhagen v. London Assur. Co., 1 Camp. 455; Samuel v. Royal Exch. Co., 8 Barn. & C. 119. But compare secs. 1488, 1531, herein.

[139] Sherwood v. Agricultural Ins. Co., 73 N. Y. 447.

[140] Dickey v. United Ins. Co., 11 Johns. (N. Y.) 358. See Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75 (case of insurance on cargo).

[141] Waples v. Eames, 2 Str. 1248.

[142] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 18 pp. 585, 586.

[143] 8 Cranch (U. S.), 75.

was upon goods until safely landed at Leghorn, and Chief Justice Marshall declared that the actual landing of the goods at the lazaretto, about half a mile below Leghorn, was the landing contemplated under the said usage by the parties, and therefore terminated the risk, and had the parties intended otherwise, it should have been so stipulated.

§ 1528. Ship Insured to Designated Port without Provision as to Duration of Risk after Arrival.—In case of an insurance generally upon a ship to a designated port, without any provision as to the duration of the risk after her arrival there, the risk continues upon the vessel until her arrival at said port of destination, and till safely moored at the usual place.[144] Where a vessel was insured from Sissa to Havana, and having arrived at said last-named port was ordered to anchor under Moro Castle, by reason of a frigate's entering the harbor, and suffered damage the next day while attempting to reach the usual place of discharge, the insurers were held liable.[145]

§ 1529. Insurance "at and from" a Port—Several Ports within One Classification.—A port may comprehend within one legal classification as members thereof, for the purposes of revenue, etc., other places which are geographically distinct or distinct within the meaning of a contract of marine insurance, or in a commercial sense, as where one port has a separate harbor, but is within customhouse limits of another port. The question whether the one port embraces within its limits, for the purposes of attachment of the risk "at

[144] Dickey v. United Ins. Co., 11 Johns. (N. Y.) 358; Anonymous, Skin. 243; Stone v. Marine Ins. Co., L. R. 1 Ex. D. 81; Bill v. Mason, 6 Mass. 313; 1 Marshall on Insurance, ed. 1810, *265; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 459, *455; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 418; 1 Phillips on Insurance, 3d ed., 536, sec. 969. Emerigon says that, according to the Ordonnance of 1681, "the voyage, so far as the ship is concerned, is finished only when the vessel is anchored in the port of her destination and moored to the quay": Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 18, p. 585.

[145] Zacharie v. New Orleans Ins. Co., 17 Mart. (La.) 637.

and from" any one of the places within such general classification must depend upon mercantile usage, and also upon the exact construction of the terms of the contract; the point being, What is the terminus a quo contemplated by the contract? What one place is generally understood as the port? And ordinarily the port so ascertained will, in the absence of usage to the contrary, be construed to be the place of attachment of the risk, so that the risk will not attach "at" another place which is geographically and as a port of lading separate and distinct therefrom, even though it be within its limits as a member thereof. The same question may arise as to whether a place may be considered as a single port of discharge, comprehending within it several other places, and in such case a usage to treat such single port as a port of discharge, taking the other places as merely separate landing places within it, will make it such where such usage is settled, uniform, and well understood at the time the contract is made.[146] The following cases illustrate the rule: Goods were insured "at and from" C., and the cargo was taken in at L., which was a member of the port of C., but the vessel cleared at L., where there was a customhouse, there being also a customhouse at C., and it was held that the risk had not attached.[147] So in case of an insurance on a cargo at and from Lyme to London, the policy will not attach upon goods shipped at Bridport, a separate harbor about eight miles from the town of Lyme, although the former port is within the customhouse limits of the latter.[148] Where an insurance was upon freight from New York to a port of discharge in Australia, and the vessel arrived at Geelong, in the bay of Port Phillip, where so much of the cargo as was destined for that place was discharged, and the balance of the cargo being des-

[146] Fay v. Alliance Ins. Co., 16 Gray (Mass.), 455; Brown v. Tayleur, 4 Ad. & E. 241; Constable v. Noble, 2 Taunt. 403; Moxon v. Atkyns, 3 Camp. 400; Cockey v. Atkinson, 3 Barn. & Ald. 460; Payne v. Hutchinson, 2 Taunt. 405, n.; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 451, 452, *447, sec. 169. See, also, sec. 1505, herein.

[147] Payne v. Hutchinson, 2 Taunt. 405, n.

[148] Constable v. Noble, 2 Taunt. 405. It was declared in this case that usage for ships to load at Bridport might have been proven.

tined to Melbourne, the ship proceeded to Hobson's Bay, an anchorage ground in the port of Melbourne, but within the bay of Port Phillip and twenty-five miles from Geelong, the ship and cargo being there lost, it was held that the insurers might be bound by usage to treat the bay of Port Phillip as a single port of discharge, taking Geelong, Hobson's Bay, and Melbourne as separate landing places included therein.[149]

§ **1530. Termination of Risk—Time Policy.**—As already stated, a policy which contemplates an insurance strictly on time terminates by the expiration of the time specified, and this is also true where the voyage under a time policy is designated, but not for the purpose of determining the duration of the risk,[150] although the clauses "at sea" or "on a passage" in the policy have an effect of continuing the risk beyond the period originally limited.[151] Where a privateer was insured from Jamaica to "any ports or places whatsoever at sea or shore, a cruising from port to ports and places" for four calendar months, and by reason of mutiny and desertion the cruise was prevented and lost, but she arrived at Jamaica and was there in safety at the end of the period, it was held that the insurers were discharged.[152] But where a vessel insured at and from Boston to all places on the globe till her return to Boston, not exceeding two years, sailed from a foreign port for Boston, it was held that the risk did not terminate on her arrival at Salem, where she had been ordered by the owner for repairs, on arriving within the term in the bay below Boston harbor.[153]

§ **1531. Risk Terminates by Abandonment or Change of Voyage Insured.**—If the voyage insured is commenced, but is thereafter actually changed or abandoned, the intent to proceed to the terminus ad quem being actually and abso-

[149] Fay v. Alliance Ins. Co., 16 Gray (Mass.), 455.

[150] Sections 1489, 1490, 1493, herein.

[151] Section 1506, herein.

[152] Pole v. Fitzgerald, 4 Brown Parl. C. 439; affirming Willes, 641.

[153] Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14. See Dodge v. Essex Ins. Co., 12 Gray (Mass.), 65.

lutely given up, the risk is terminated and the insurers discharged.[154] In this connection the question arises whether an abandonment of, or departure from, the voyage insured is justified by an endeavor to avoid a peril not insured against, or an excepted peril. It is a general rule that if the voyage is broken up and lost, the loss, to bind the insurers, must be by some peril insured against acting directly upon the subject of insurance, and it is held that it is not sufficient that the voyage be abandoned for fear of the operation of an excepted peril or peril not insured against, or that it be abandoned or broken up, or another and distinct voyage undertaken by reason of such peril. And the weight of authority, although the law does not appear clearly settled, seems to be that the fear of an excepted peril or peril not insured against does not justify the ship's departure from the course to avoid the same, nor an abandonment of the voyage.[155] This question will, however, be fully considered hereafter.

§ 1532. Risk Terminates in Case of Island or District at First Port of Discharge, etc.—In case of an insurance generally to an island without naming any specific port, the risk on the ship ends on being moored twenty-four hours in safety in the first port of the island for the purpose of unloading and discharging her cargo, and where she unloads the bulk thereof, and does not continue till the vessel reaches her last port of delivery.[156] If a vessel is insured "to a port or

[154] Blackenhagen v. London Assur. Co., 1 Camp. 454; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 469, *465; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 427; 1 Phillips on Insurance, 3d ed., 533, sec. 966. See sec. 1488, and compare sec. 1526, herein.

[155] Smith v. Universal Ins. Co., 6 Wheat. (U. S.) 176, per Story, J.; Lee v. Gray, 7 Mass. 349; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 288; Speyer v. New York Ins. Co., 3 Johns. (N. Y.) 88; Richardson v. Marine Ins. Co., 6 Mass. 102, 121; Roget v. Thurston, 2 Johns. Cas. (N. Y.) 248; Scott v. Thompson, 1 Bos. & P. N. R. 81. Examine Brown v. Vigue, 12 East, 283. But see Vigers v. Ocean Ins. Co., 12 La. 367; Savage v. Pleasants, 5 Binn. (Pa.) 503.

[156] Leigh v. Mather, 1 Esp. 412, reported in 1 Marshall on Insurance, ed. 1810, *267, per Lord Kenyon; Camden v. Cowley, 1 W. Black. 417, per Lord Mansfield; Inglis v. Vaux, 3 Camp. 437; 1 Marshall on Insurance, ed. 1810, *266, et seq. See secs. 1501, 1524, 1547, herein.

ports in the island of Cuba," a denial of entry into one of such ports is not a loss within the policy.[157]

§ **1533. Continuance of Risk while Loading at Specified Port.**—The risk may continue on a vessel while she remains at a specified port under the clause "while loading" at said port, although she be not engaged in "loading" during all of said period of her stay there.[158]

§ **1534. Continuance of Risk on Fishing Voyage—Part of Cargo Arriving by Another Ship.**—Where a ship is insured for a fishing voyage, and sends home by another vessel a portion of her catchings, in order to preserve the part thereof which is retained from being infected and destroyed, such act does not terminate the voyage.[159]

§ **1535. Continuance of Risk on Furniture, etc., of Ship.**—Ordinarily, a marine policy extends to sea risks and the risk on the rigging, tackle, furniture, and provisions of the ship continues only so long as they remain attached to or on board the vessel. But if it becomes necessary to put these articles temporarily on shore to repair or to refit the ship during the usual course of the voyage, and such act is sanctioned by a universal usage in like cases, the risk will continue upon the same while they remain on shore for the purpose stated herein, and the insurer of such articles is liable in such case for

[157] Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 181.

[158] Reed v. Merchants' Mut. Ins. Co., 95 U. S. 23, Mr. Justice Bradley said: "The case turns upon the point whether the clause means while at a port for the purpose of loading, or while at the said port actually loading. If it means the latter, the company is liable. The clause would revive at any time after loading commenced if discontinued by stress of weather. It would revive at night while the men slept. . . . . At no time after her arrival was it possible to discharge ballast or receive cargo. The facts show that she was at the port for the purpose of loading. That the process had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the island and was safely moored in her station for loading."

[159] Phillips v. Champion, 6 Taunt. 3.

their loss from a peril insured against.[160] But spars, blocks, etc., required for the proper building and equipment of a vessel then in the course of construction are not covered by a policy insuring the vessel against loss by fire, unless it is proven that by the custom of that place articles of that character are protected by the policy even though in a warehouse. Evidence is not admissible of the usage of another place to show that such articles are covered.[161]

§ 1536. Putting into Port Other than that of Original Destination and Discharging Small Part of Cargo.—If a ship is insured to a particular port of delivery, and by stress of weather puts into a port other than that of her original destination, and there discharges a small part of her cargo, the risk nevertheless continues till her arrival at her port of delivery.[162] And if a vessel engaged in the East India trade is insured to her last port of discharge, and she stops at a port other than that which was originally intended by the parties as her last port of discharge, and unloads a portion of her cargo, but retains on board that portion intended for said last port of discharge, the risk continues until said final port is reached and she has there moored in safety for the purpose of discharge.[163]

§ 1537. Moored Twenty-four Hours in Good Safety.—Under this clause in the policy the risk on the ship continues, and does not terminate until she has moored twenty-four hours in good safety at the port to which she was originally destined.[164] Emerigon says the French Ordonnance of 1681 pro-

[160] Stone v. Marine Ins. Co., Ocean Limited, etc., 1 Ex. Div. 81; Brough v. Whitmore, 4 Term. Rep. 206; Pelly v. Royal Exch. Assur. Co., 1 Burr. 341; 1 Marshall on Insurance, ed. 1810, *269, *270.

[161] Mason v. Franklin F. Ins. Co., 12 Gill & J. (Md.) 468.

[162] Leigh v. Mather, 1 Esp. 412, per Lord Kenyon. See, also, Delaney v. Stoddart, 1 Term. Rep. 22, per Lord Mansfield, where a vessel was by stress of weather compelled to finish her loading at another port than that specified as the place of commencement of the risk. See "Deviation," herein.

[163] Preston v. Greenwood, 4 Doug. 28.

[164] Leeds v. Mechanics' Ins. Co., 8 N. Y. 351; Bitt v. Mason, 6 Mass. 313.

vides that the risk shall continue on the ship, its rigging, furniture, and stores "until anchored in the port of its destination and moored at the quay," differing from the former law under the Guidon, which provided for its continuance "until arrived at its destination, anchored, and remained moored twenty-four hours in harbor."[165] Mr. Marshall quotes with approval the objections of Magen to the use of this clause, on the ground that the freight remains unprotected thereunder after the twenty-four hours in case the ship is not discharged, and therefore the risk should be stipulated to continue a specified number of days after the ship's arrival.[166] We have, however, noted cases where policies so stipulate.[167]

§ 1538. What Constitutes being Moored Twenty-four Hours in Good Safety.—In case of insurance on a ship under this clause, she must arrive at her ultimate point or place of destination in the usual anchorage ground and usual place of discharge, and be there securely moored twenty-four hours in safety from the perils insured against, in a situation to unload or discharge her cargo. If, under such conditions, she does not suffer a loss insured against, she is safe; and when she is moored at her port of original destination, the fact that she does not within the twenty-four hours unload or discharge her cargo, and has not broken bulk, does not aid the insured, and the insurers are not in such case liable for her loss or damage actually sustained after the expiration of the specified period.[168]

[165] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 1, pp. 536, 537, et seq. The author notes also the Ordonnances and forms then existing in several maritime countries. See, also, 1 Arnould on Marine Insurance, Perkins' ed. 1850, 454, et seq., *450, et seq., sec. 171; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 412, where references are given to the more recent foreign laws.

[166] 1 Marshall on Insurance, ed. 1810, *262; citing 1 Magen, 23, 47; Skin. 243.

[167] Section 1492, herein. See, also, Lidgett v. Secretan, 6 L. R. Com. P. 616; 40 L. J. Com. P. 257.

[168] Bill v. Mason, 6 Mass. 313; Mariatigue v. Louisiana Ins. Co., 8 La. 65; 28 Am. Dec. 129; Meigs v. Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439; Samuel v. Royal Exch. Assur. Co., 8 Barn. & C. 119; Waples v. Eames, 2 Strange, 1248.

§ **1539. Limitation of the Rule.**—This rule has, however, been limited by the case of Angerstein v. Bell[169] which holds that if a ship is fastened outside of a tier of vessels at the wharf where she is to unload, there being no room for her inside, and lies there over twenty-four hours awaiting her turn to unload, she has moored twenty-four hours in good safety.

§ **1540. When Vessel has Arrived.**—Ordinarily, a vessel has not arrived until she drops her anchor or is moored,[170] and the question whether the ship has arrived and when will be one for the jury.[171] If the vessel be insured until she has "arrived and moored twenty-four hours in safety," and for want of sufficient water she cannot come to the wharf which is the place of her final destination, and consequently anchors in the harbor for more than twenty-four hours and is lightened, and thereafter, while properly pursuing her course to complete her final unloading, she is lost by a peril insured against, the underwriters are liable, for reaching the harbor is not arriving; the vessel must reach and be moored at that particular place or point which is the ultimate destination of the ship.[172] A vessel arrives at a "port of discharge" when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Thus, where the insurance was "until she shall be safely arrived at such port of discharge and moored twenty-four hours in good safety," and she arrived and anchored at a port which was an open roadstead, where all vessels were compelled to anchor and discharge part of their cargo in lighters, in order to be lightened enough to go into an inner basin, and the ship having so discharged a part of her cargo, remaining there over twenty-four hours, was wrecked before making the inner basin, it was held that she had safely arrived and was moored in safety; and in such case the policy terminates, and cannot be extended or revived after such discharge by her re-

[169] Reported in 1 Marshall on Insurance, ed. 1810, *262; also in 1 Park on Insurance, 54.

[170] Gray v. Gardner, 17 Mass. 188.

[171] Lindsay v. Jansen, 28 L. J. Ex. 315; 4 Hurl. & N. 699.

[172] Meigs v. Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439.

moval to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo or for any other purpose.[173] Where a vessel was insured to a port of discharge in the United States, and entered the port of New York to await orders, and thereafter proceeded as ordered to Middletown, in Connecticut, New York was held to be her port of arrival and that of discharge.[174]

§ **1541. Vessel may have Arrived and yet Never have been Moored in Safety.**—Although a vessel may have arrived, yet if she is never moored twenty-four hours in safety, the requirements of the clause are not satisfied. Thus, the ship may have arrived in a hostile port with simulated papers, and be there seized to all intents and purposes, being afterward condemned,[175] or the ship may have arrived in port a mere wreck;[176] in neither of these instances is the ship moored in good safety.

§ **1542. Mere Temporary Mooring not Sufficient.**—A mere temporary mooring at the usual place of discharge does not constitute a mooring in good safety; as where a vessel had moored for a short time at the wharf, but within the twenty-four hours was ordered into quarantine, and was lost after the twenty-four hours by a peril insured against, she was not considered to have moored in good safety, because as it would seem she had not, before the loss for which recovery was claimed, been finally moored at the ordinary place of mooring.[177]

§ **1543. Degree and Kind of Physical Safety Required.** Although the ship is required to be moored as safely as the particular port or harbor permits in the usual course of navigation, nevertheless being moored in safety refers rather to the safety of the ship, than to perils of a local character, such

[173] Bramhall v. Sun Mut. Ins. Co., 104 Mass. 510; 6 Am. Rep. 261.
[174] King v. Middletown Ins. Co., 1 Conn. 184.
[175] Hommeyer v. Lushington, 15 East, 46.
[176] Shawe v. Felton, 2 East, 110.
[177] Waples v. Eames, 2 Strange, 1243. See sec. 1527, herein.

as the moorings. It is not necessary that the ship arrive absolutely free from all physical damage or injury from the effects of the voyage; it cannot be reasonably contended that the loss of a mast or a sail or a rope prevents a vessel, which is perfectly fit to keep a river or the sea, from being considered in safety.[178] A vessel may be considerably damaged and leaky at the time of her arrival, and yet be able to keep afloat as a ship, and to moor in such a condition at the usual place of discharge, and there remain in a situation to discharge her cargo during the twenty-four hours in the possession and control of her owners, and in safety from the perils insured against. In such a case the insurers are not liable for a total loss occurring after the period specified.[179] The facts of the last case[180] suggest the question, Exactly where can the dividing line as to the degree of physical safety of the ship be drawn? The vessel in said case required extraordinary pumping to keep her clear of the water which was in one of her

[178] Waples v. Eames, 2 Strange, 1243; Lidgett v. Secretan, L. R. 5 Com. P. 190, per Bovill, C. J.

[179] In the decision upholding this rule which was made in England in 1870 in the court of common pleas, the risk was "at and from London to Calcutta, and for thirty days after arrival," to continue upon the ship "until she have moored at anchor twenty-four hours in good safety." The facts were those last above stated, with the addition that the ship completely and safely discharged her cargo, except a portion, which was left for ballast. She was moored and left in safety on the 28th of October, and her cargo was discharged by the 8th of November. On the 12th of November she was taken from her moorings into drydock for survey and repairs, and while there was wholly destroyed by fire the 5th of December, and the question was distinctly in issue whether having been moored in a damaged state extended the time so as to cover the total loss by fire, the defendant claiming that the plaintiff could only claim in respect to the partial loss by sea damage, and it was declared that the claim for total loss could not be sustained. It will be observed, however, that the court in so ruling placed stress upon the facts: 1. That the vessel had discharged her cargo; and 2. That the ship remained so long a time in the possession and control of her owners after the expiration of the twenty-four hours before the loss occurred, viz., until the thirty-eighth day after she was moored: Lidgett v. Secretan, L. R. 5 Com. P. 190; citing Bell v. Mason, 6 Mass. 313; Shawe v. Felton, 2 East, 109; Hommeyer v. Lushington, 15 East, 46; Waples v. Eames, 2 Strange, 1243; Lockyer v. Offley, 1 Term Rep. 252.

[180] See last note.

compartments; she was also injured in her rudder and steering apparatus, so as to materially affect her steering, and was unfit for the sea, so much so that if she had broken away from her moorings she would have been at the least greatly endangered. It is distinctly held in another case that the condition as to safety is not satisfied if the vessel arrives a mere wreck, or if she is moored in a sinking state, and is obliged to be lashed to a hulk to keep her afloat, and the vessel sinks on being moored to the shore.[181] The court in the former case says that in the case before him the vessel existed as a ship at the time of her arrival, while in the latter case he declares that the vessel arrived as a wreck, and not as a ship.

§ 1544. Degree and Kind of Safety Required—Seizure, etc.—If upon arrival, and before the ship has been moored the twenty-four hours at the usual place of discharge, she is so subjected to a seizure, either actual or constructive, as that she is to all intents and purposes within the power and control of the enemy or hostile force, or of the government of the port, she cannot be said to have been moored twenty-four hours in safety, since that term has reference as well to political as to physical safety, and it makes no difference, in such case, that the master is permitted by the enemy to unload his cargo after the seizure.[182] But if the vessel be not seized until after she has been moored the twenty-four hours, she is none the less in safety, even though the offense be one which rendered her liable to seizure within or before the twenty-four hours; as in case of smuggling by the master during the voyage, for the seizure cannot be held to be retroactive in effect; and insurers are released, for although the remote cause of the loss was the barratry of the master, it does not, in such case, result in loss till the risk has terminated.[183]

§ 1545. Ship Moored at Outer Harbor or Outside Place of Usual Discharge and Unable to Enter.—A ship is

[181] Shawe v. Felton, 2 East, 109.

[182] Minnett v. Anderson, Peakes N. P. 211; Hommeyer v. Lushington, 15 East, 46.

[183] Mariatigue v. Louisiana Ins. Co., 8 La. (O. S.) 65; Lockyer v. Offley, 1 Term Rep. 252.

not moored in good safety at her destined port where she awaits at an outer harbor, which is not a place of discharge, permission from the customhouse authorities to enter the inner harbor and discharge her cargo. It was so held where a vessel having arrived with a cargo of slaves under a policy "at and from" St. Bartholomew's to Havana, she anchored off Moro Castle, where all vessels stop to be visited, and, while awaiting the result of a petition to the customhouse for permission to land the slaves, she was lost in a storm; and the fact that there was a warranty "free from loss if not permitted entry in consequence of having negroes on board," cannot in such case aid the insurer.[184] And if a vessel is prevented by shallow water from reaching her wharf of destination, and while anchored outside and being lightened, to enable her to reach said wharf, she is destroyed by one of the perils insured against, the insurers are liable.[185] Nor does the mere fact of mooring and lying for several days outside the docks into which the captain has received orders to take the ship, and within which is the usual place of discharge, constitute a mooring in good safety, even though a certain class of vessels occasionally discharge at the place where she is actually moored; especially where it appears that the captain, having arrived outside the dock gates, was unable to enter, owing to ice, and also by reason of the fact that permission had not been granted to enter.[186] But a mooring at an open roadstead, where all ships are compelled to anchor and lighten their cargo before they can be admitted to an inner basin, will constitute a mooring in safety when the ship is there over twenty-four hours safely moored.[187] And if a vessel lies outside an anchorage ground outside the harbor of the port to which the vessel is destined, and there discharges a part of her cargo by lighters to enable her to pass the bar, vessels of her draught being accustomed so to do, the risk terminates on her being moored at such anchorage ground twenty-four hours in safety.[188]

[184] Dickey v. United States Ins. Co., 11 Johns. (N. Y.) 358.

[185] Meigs v. Mutual Ins. Co., 2 Cush. (Mass.) 439.

[186] Samuel v. Royal Exch. Co., 8 Barn. & C. 119.

[187] Bamhall v. Sun Mut. Ins. Co., 104 Mass. 510. See sec. 1505, herein.

[188] Simpson v. Pacific Mut. Ins. Co., 1 Holmes, 136.

§ 1546. Mere Liability to Damage does not of Itself Prevent the Ship being in Safety.—The fact that the ship during the twenty-four hours after being moored is liable to damage or total loss does not of itself prevent the ship being in safety within the meaning of that term; the determining factor is whether she was in fact lost or damaged within the specified period by a peril insured against. A ship is none the less in safety, within the meaning of that term, merely because she is exposed during the twenty-four hours to a storm or other peril insured against, even though it may have begun before the vessel moored. The condition is satisfied if the safety continues during the twenty-four hours.[189] "We think also that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours after having moored in good safety clearly implies that notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against." [190]

§ 1547. Port of Discharge—Last Port of Discharge.—Under an insurance on the ship to her port of discharge, if the parties originally intended to discharge at a certain port, and the vessel there moors twenty-four hours in safety and breaks bulk for that purpose, or substantially discharges her cargo, this will be held her port of discharge.[191] So where a vessel was insured to her discharging port in the United Kingdom, and until there moored twenty-four hours in good safety, and she arrived in the Mersey, and was towed up abreast the Wollasly Pool, and being unable by reason of her great draught to enter, and anchored outside the pool more than twenty-four hours, and discharged a large portion of her cargo, the master having engaged lumpers therefor, it was held

[189] Bell v. Mason, 6 Mass. 313.

[190] Lidgett v. Secretan, L. R. 5 Com. P. 190, per Bovill, C. J. See, also, 2 Parsons' Marine Law, 326.

[191] Clason v. Simonds, 6 Term Rep. 533, n.; Coolidge v. Gray, 8 Mass. 527.

that the risk was terminated, the court declaring that it was evident that Wollasly Pool was intended as the place of discharge of the cargo, and the fact that the captain intended to carry the vessel with so much of the cargo as he could into Wollasly Pool could not alter the decision, since the whole cargo might have been duly discharged where she was moored, had no accident prevented, if the water were not sufficient for the vessel to enter. A controlling factor in this case, however, was that the vessel was chartered to take the cargo into Wollasly Pool, or as near thereto as she could safely get and discharge.[192] And the fact that a vessel arrives at a port in a specified country and discharges the seamen there and employs others, does not prove such port to be a port of discharge.[193] The last port of discharge may, however, be the one where the ship actually discharges her cargo, although it is not the port at which it was originally intended to discharge.[194] If a ship is insured to a port of discharge in a certain country, as in case of an insurance to the United States, the question arises as to the purpose of the ship in entering the first port. If the ship enters a port in said country to ascertain the state of the market, and to determine whether it will discharge there or proceed to another port, the fact that the master intends to discharge there in case of a favorable market does not of itself make that port a port of discharge and terminate the risk, where the ship proceeds to another port and discharges, and this is so even though the ship moors at said port twenty-four hours in safety.[195] And a port of discharge does not extend to the anchorage in the open sea seven miles from the port of destination, and a capture there is not a capture in the ship's port of discharge, even though she is brought into the roads, where part of her goods are discharged by lighters.[196] And it

[192] Whitwell v. Harrison, 2 Exch. 127.

[193] King v. Hartford Ins. Co., 1 Conn. 333.

[194] Moffat v. Ward, 4 Doug. 31.

[195] Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1; Coolidge v. Gray, 8 Mass. 527. But see Brown v. Vigne, 12 East, 283. See, also, Upton v. Commercial Ins. Co., 8 Met. (Mass.) 606; Wilson v. Delacour, 2 Esp. 619; Oliverson v. Brightman, L. R. 8 Q. B. 1781.

[196] Mellish v. Stainforth, 3 Taunt. 499; Keyser v. Scott, 3 Taunt. 660.

is also held that an open roadstead is not a port of discharge so as to discharge the insurers from a loss by capture there made.[197] If a ship insured to a port of discharge to the United States enters a port there to await orders, this does not constitute such port a port of discharge, where in pursuance of orders received she proceeds to another port and there discharges, and so even though, for the purpose of lightening, she puts part of her cargo into lighters to be conveyed to such port of discharge, for such putting into lighters is not breaking bulk, nor is the risk on the ship terminated by discharging perishable goods at a port where she is awaiting orders, where the ship, after waiting a reasonable time, proceeds to another port with a view to make the latter port her port of discharge, and the insurers are in such case liable for a loss occurring between the two said ports.[198]

§ 1548. Until She shall Arrive in Safety in any Port or Harbor of a Particular Place.—Where a vessel is insured, the risk to continue until she shall arrive in safety in

[197] Anthony v. Moline, 5 Taunt. 711.

[198] King v. Middletown Ins. Co., 1 Conn. 184. "If the port of arrival is of course the port of discharge, being one and the same thing, the argument is with the defendants, and in that case the agents of the owners will be obliged to select their port of discharge when in a foreign country without any means of knowing the state of the market to which they are going. This appears to me unreasonable. But if the port of discharge may mean a different port from the port of arrival, then to such different port is the vessel insured, and the risk does not terminate upon her arrival at any port. And this appears most reasonable, that the agents of the insured may be able to learn upon their arrival in the United States at what port they can sell their cargo to greatest advantage, and thus sail to their port of discharge protected by the policy. If by the port of discharge we may conclude that the parties meant where the vessel should unload, on what principle could the court be justified in saying that they meant where the vessel should first arrive? This the court could never say, unless 'port of arrival' and 'port of discharge' are synonymous terms. They certainly are not so used in common parlance, and in no book can we find that in a legal sense they mean one and the same thing. We are, therefore, bound to understand them in a policy of insurance as the terms naturally import," per Reeve, C. J. See Sage v. Middletown Ins. Co., 1 Conn. 239. See, also, secs. 1501, 1505, 1508, 1524, and 1532, herein.

any port or harbor of the Frith of Forth, and she is forced by stress of weather into a place within said Frith of Forth, and is there wrecked, it is held that the risk determines on her arrival there.[199]

§ **1549. Risk may be Terminated by Substituting another Port of Delivery.**—Although a vessel is insured to a designated port, the substitution by consent of another port as that of delivery operates to terminate the risk at such substituted port.[200]

§ **1550. To Port or Ports of Discharge—Usage of Trade to Keep Cargo on Board for a Time after Arrival.**—Where a vessel is insured to port or ports of discharge, and the custom of vessels engaged in that trade is to keep their cargoes on board for several months after arrival, such usage will control.[201]

§ **1551. Ship Insured to One of Two Ports in Alternative.**—If the port of destination is placed in the alternative, as to S. or B., and she proceeds to the first port without electing to go to the latter, the risk will terminate at the first port.[202]

§ **1552. Termination of Risk by Undertaking Distinct Voyage before Commencing Voyage Insured.**—If a vessel insured "at and from" undertakes another voyage before commencing that insured, this releases the insurers, even though the trip is a trial trip to test the engines and take in coal.[203]

§ **1553. Loss Incurred before Expiration of Risk—Expense Incurred thereafter to Repair Injury.**—If a vessel is insured on time, and before the term expires she is in-

[199] Melvill v. Stewart, 3 F. D. 254.

[200] Shapley v. Tappan, 9 Mass. 20.

[201] Noble v. Kenneway, 2 Doug. 510.

[202] Dodge v. Essex Ins. Co., 12 Gray (Mass.), 65.

[203] Fernandez v. Great Western Ins. Co., 48 N. Y. 571; 3 Rob. (N. Y.) 457; Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 10, pp. 565-67, who says: "If before the voyage insured be commenced the captain undertakes another, the insurance is null."

jured by a peril insured against, whatever expense is incurred, whether before the risk expires or thereafter, to repair the damage and place the vessel in a situation to make her valuable, is a loss within the policy.[204]

§ 1554. Mutual Insurance Association—Termination of Risk—Nonpayment of Contribution.—In an English case "by the rules of a marine insurance association the members insured each other's ships from noon on February 20th in any year, or from the date of entry of a vessel, until noon of February 20th in the succeeding year, and the managers were empowered to levy contributions of one-fourth part of the estimated annual premiums quarterly in each year, such premiums of insurance to form a fund for the payment of claims; and if any member should refuse to pay his contributions thereto, his respective ship or ships should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss. On the 5th of April, 1881, a loss incurred in the year 1880-81 upon a ship belonging to the plaintiff, and insured in the association, was fixed by an average adjuster at one hundred and eighty pounds. A call of forty-one pounds ten shillings, made on the plaintiff on the 5th of May, 1881, for the second quarter of 1881-82, was by mutual consent set off against the loss. On the 13th of May, 1881, the association paid the plaintiff one hundred pounds on further account of the loss. On the 23d of June, 1881, a call was made on the plaintiff of fifty-two pounds sixteen shillings eight pence, and on the 5th of July, 1881, another call of thirty-one pounds four shillings. The plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of the plaintiff's ships insured in the association was wholly lost. It was held in the case stated that as the calls were made in respect of matters relating to the 1880-81 policy, and it was not shown that they were in respect of his ship insured as aforesaid, the plaintiff's ship did not cease

[204] Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311.

to be insured, and that he had not forfeited his claim in respect to the loss." [205]

§ 1555. Expiration by Limitation of "Binding" Memorandum.—If the memorandum or "binding" slip under a contract on the chartered freight of a vessel leaves the rate of premium "open for particulars," and there is nothing to show that the rate of premium is to be kept open for any other particulars than those which are shown by the charter-party, and these are in the possession of insured ten days before the vessel sails, it becomes the duty of insured to communicate these facts at once to the insurer, and the failure so to do within a reasonable time, and not until after loss, causes the contract to expire by limitation.[206]

[205] Syllabus in Williams v. British-American Mut. Ins. Assn., Lim., as reported in 6 Asp. Rep. Mar. Cas., N. S., 134, by J. Smith, Esq.

[206] Scammell v. China Mut. Ins. Co., 164 Mass. 341. The court, per Knowlton, J., says: "The construction which we put upon this preliminary arrangement in regard to the undertaking of the plaintiff to furnish additional facts without unnecessary delay accords with the testimony of all the experts as to usage in similar cases."

CHAPTER XXXVIII.

ATTACHMENT AND DURATION OF RISK.

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II. Attachment and Duration of Risk on Freight.

SUBDIV. I. Attachment and Duration of Risk on Goods.

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SUBDIV. I. Attachment and Duration of Risk on Goods.

§ 1562. Attachment and Duration of Risk on Goods —Generally.—In determining when the risk upon goods attaches and ends under marine policies, reference must be had to the contract stipulations to usage as well as to the character of the risk and the object of the voyage. Under the French Ordonnance of 1681, if the time of the risk is not regulated by contract, it will run as to the goods as soon as they shall have been shipped in the vessel or the lighters to be carried on board ship, and continue until said goods are delivered on shore. Emerigon says: "The reason of it is this: the maritime risk begins the moment that the merchandise is exposed to the sea, whether it be in the vessel or on the traject to reach the vessel." [1] But in England and this country the ordinary form of marine policy in general use is so worded as to establish a different rule, since the risk under such policies attaches only from the loading of the goods on board the vessel, and this

[1] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 2, p. 538. This author also notes the different ordonnances and forms then existing in the different continental states: Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 2, pp. 536, 537. See, also, 1 Marshall on Insurance, ed. 1810, *247 a; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 423, *417, note a; 1 Arnould on Marine Insurance Maclachlan's ed. 1887, 378, note 1, where the modern codes, ordonnances, and forms are noted.

contemplates an actual loading, and excludes the goods from protection of the insurance before that time,[2] and the risk continues on said goods until they are discharged and safely landed. Usage may, however, modify the terms of the contract; thus, as we shall note hereafter, it is held that under the ordinary form above mentioned the risk may, under a notorious and established usage, attach before the goods are loaded aboard the vessel.[3] Again, the risk may attach under a trading voyage, however often the goods may be changed.[4] So parties may stipulate that the risk may commence on goods before they are loaded, or the contract may be so framed as to apply to particular cases, or to cover contemplated contingencies. The various points involved will, however, be considered under this chapter so far as there are decisions upon them. The goods must be insured, for they are not protected by an insurance on the ship on which they are laden.[5]

§ **1563. Insurance on Goods may be Retrospective.**—A policy may be effected upon goods "lost or not lost," and may cover a loss occurring prior to the date of the policy.[6]

§ **1564. Risk will not Attach until Assured Acquires an Interest in the Goods—Exception.**—It has already been stated that the insured must have an insurable interest in the property covered by the policy, and if the assured does not acquire title to the goods until the shipment of the cargo is completed, the policy will not attach so as to cover the goods in the course of shipment.[7] But if the policy be upon goods lost or not lost, it may render the insurers liable for a partial loss occurring before the insured acquired his interest.[8]

[2] 1 Marshall on Insurance, ed. 1810, *249.

[3] See sec. 1569, herein.

[4] Coggershall v. American Ins. Co., 3 Wend. (N. Y.) 283.

[5] 1 Marshall on Insurance, ed. 1810, 320 a.

[6] Merchants' Insurance Co. v. Paige, 60 Ill. 448; Clement v. Phœnix Ins. Co., 6 Blatchf (C. C.) 481; Sutherland v. Pratt, 11 Mees. & W. 296; 7 Jur. 261; 13 L. J. Ex. 246; Schroeder v. Stock & Mut. Ins. Co., 46 Mo. 174. See secs. 105-108, 1444, herein.

[7] Anderson v. Morice, 3 Asp. Mar. L. Cas. 291.

[8] Sutherland v. Pratt, 11 Mees. & W. 296; 7 Jur. 261; 13 L. J. Ex. 246.

§ 1565. Goods on Shore in Warehouses—On the Wharf awaiting Shipment—For Trading Voyages—Temporarily Landed in Government Warehouses—Landed for Transportation to Port—Quarantine.—Goods may be insured by a policy covering them while on shore awaiting shipment,[9] or the policy may provide against risk of fire, and from the date of storage until the goods are shipped, and such a description will cover goods on shore in storage where a premium is charged therefor in addition to the marine premium, it appearing from the application that such goods were described together with those intended to be insured under a marine policy.[10] But goods on shore or in warehouses or on the wharf awaiting shipment are not protected by the ordinary marine policy containing the clause providing that the risk shall attach upon the goods from and immediately following the loading thereof on board ship, even though the insurance is upon "goods laden or to be laden," and the goods are on the wharf of the steamship company awaiting shipment in one of its vessels.[11] Emerigon notes the following case, where the risk was, under the stipulations of the contract, to commence on the merchandise as soon as brought on board the ship. The merchandise was ready to be embarked, and part of it had been placed on board the vessel, when a violent gale arose, necessitating the leaving a part of the merchandise on shore, and it was held that the risk had never attached on the merchandise on shore, because it had never been exposed to the perils of the sea, and therefore the same never formed the subject of the insurance.[12] Nor are goods on shore protected even though the policy gives liberty to touch at different ports, and the goods are destined for the cargo insured, and the vessel is in port awaiting their shipment, unless it is otherwise stipulated, as it is necessary that

[9] Fire Ins. Co. v. Merchants' etc. Transp. Co., 66 Md. 339.

[10] Kennebec v. Augusta Ins. etc. Co., 6 Gray (Mass.), 204.

[11] Smith v. Mobile Nav. & Mut. Ins. Co., 30 Ala. 167; Cottam v. Mechanics & Traders' Ins. Co., 40 La. Ann. 259; 4 S. Rep. 510. Examine Corban v. Donne, 5 Esp. 41.

[12] Emerigon on Insurance, Meredith's ed. 1850, c. xii. sec. 47, pp. 521, 522.

the goods be exposed to the perils insured against.[13] But the goods may be temporarily placed on shore or in warehouses in furtherance of the purposes of the voyage; as in the case of trading or bartering voyages, where the goods are landed for the purpose of exchange or delivery to a purchaser. In such case, if the exchange cannot be effected or the delivery is not made, and the goods are lost by a peril insured against on being returned to the ship, and while on board the launch for that purpose, the insurers are liable.[14] And if liberty is given to touch at any port for any purpose whatsoever, and part of the goods described in the policy are taken, the policy attaches upon goods so taken.[15] And where the goods are landed and put into government warehouses in the charge of the revenue officers, the goods are not protected in the warehouses, for the risk terminates upon the goods being landed;[16] or if they are lost after being landed on the wharf, the insurers are not liable.[17] And it is also declared that unless a custom exists to land the goods on the beach for transportation to the town, the risk terminates so soon as they are put on shore.[18] And if the goods are landed on shore to be transported, according to the usages of trade, by railroad to the place of destination, the risk ends at once the goods are put on shore.[19] But the risk will continue on goods carried ashore, by reason of damage to the ship, and transported by land to be reshipped;[20] and goods may, by express stipulation, be protected while be-

[13] Harrison v. Ellis, 7 El. & B. 465; 26 L. J. Q. B. 239. See Martin v. Salem Ins. Co., 2 Mass. 420; Australian Agricultural Co. v. Saunders, L. R. 10 Com. P. 668; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 47, p. 521.

[14] Parsons v. Massachusetts F. & M. Ins. Co., 6 Mass. 197. See Harrison v. Ellis, 7 El. & B. 465; 26 L. J. Q. B. 239; Brough v. Whitmore, 4 Term Rep. 206; Tierney v. Etherington, 1 Burr. 388, 349; Pelly v. Royal Exch. Assur. Co., 1 Burr. 341; Martin v. Salem Ins. Co., 2 Mass. 420.

[15] Violett v. Allnut, 3 Taunt. 419.

[16] Brown v. Carstans, 3 Camp. 161.

[17] Mansur v. Mut. M. Ins. Co., 12 Gray (Mass.), 520.

[18] Osacar v. Louisiana State Ins. Co., 17 Mart. (La.) 386.

[19] Mobile M. Dock & Mut. Ins. Co. v. McMullan, 27 Ala. 77.

[20] Bryant v. Commonwealth Ins. Co., 13 Pick (Mass.) 543, 555, 558.

ing transported overland after landing.[21] If goods are deposited in the lazaretto, the laws of the place requiring ships and cargoes to perform quarantine, the risk terminates there, even though the consignees cannot remove the goods, and the risk is by the terms of the policy to continue till the goods are "safely landed." It was held in this case that the lazaretto was by custom the place of landing.[22] And in general the risk on goods terminates, except there be a usage otherwise, as soon as they are put on land, except, as above stated, they are temporarily landed under certain circumstances warranting their protection by the policy.[23]

§ **1566. "Safely Landed" Defined and Construed.**—Landing goods under a marine risk means putting them upon land, or upon that which, by custom of the port, is its equivalent.[24] If the goods are insured "until safely landed at ———," the risk is not continued until arrival at the warehouse, or till they reach the consignee's hands, although there is a marginal provision that all risks are covered "to the final destination." [25]

§ **1567. "Safely Landed"—Risk of Craft while Waiting for Transshipment.**—A policy on the cargo of a coasting vessel "at and from Hull to London, including all risk of craft until the goods are discharged and safely landed," does not cover the risk on the cargo while waiting on lighters at the port of delivery for transshipment into an export vessel.[26]

[21] Rodocanachi v. Elliott, L. R. 8 Com. P. 649.

[22] Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75. See Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 47, p. 523.

[23] Pelly v. Royal Exch. Assur. Co., 1 Burr. 341.

[24] Houlder Bros. v. Merchants' Ins. Co., Lim., 6 Asp. Rep. Mar. Cas., N. S., 12, per Bowen, L. J. See Langdon Branch N. P. Baking Co. v. Home Ins. Co. (C. A. Par. New Orleans, 1893); 22 Ins. L. J. 640.

[25] Beddall v. Foreign M. Ins. Co. (N. Y. C. A. 1894); 60 N. Y. St. Rep. 471; 50 N. Y. St. Rep. 745.

[26] Houlder Bros. v. Merchants' M. Ins. Co., Lim., 6 Asp. Rep. Mar. Cas., N. S., 12. Bowen, L. J., says in this case: "In the present case, instead of placing the goods upon lighters to carry them to the shore, the goods were placed upon lighters which were to take

§ 1568. Goods "to be Shipped"—Time Policy.—Under an insurance for a specified time from and after a certain date on goods "to be shipped," the word "shipped" does not mean putting on board or lading, but dispatching the goods, and the fact that the cargo is loaded before the date specified as that of the commencement of the risk does not prevent the risk attaching on all goods on board the vessel at the time she sails, within the time agreed upon as that of the duration of the risk.[27]

§ 1569. Goods in Transit in Boats or Lighters, etc.—Usage—Attachment and Termination of Risk.—Insurance may be effected to cover the goods while in transit from shore in boats or lighters, in which case the risk will attach directly they are put on board said boats or lighters. No particular form of clause is necessary, provided it is evident therefrom that the risk of craft while loading is intended to be covered. In an English case the words were used, "Beginning the adventure on the said goods from and immediately following the loading thereof on board boats at"; [28] so where the ship is engaged in a trading voyage, the risk may cover goods while they are being carried to the ship in boats or lighters at different

them to an export vessel, and there to load them as soon as she was ready to receive them. Such transshipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A lighter which has to land its cargo has only to make for the quay and wait its turn in accordance with the usages of the port. A lighter which is intended to transship the goods to another ship may have to wait its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather, and of collision with other vessels or barges in the dock. In the smaller London docks lighters may be comparatively safe, but in the larger docks they are often swamped by the winds and by the waters, and yet might be obliged to wait days, and possibly weeks, for the arrival of the export vessel to which the goods were consigned. Cargo discharged upon lighters for transshipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once."

[27] Lorbé v. Merchants' Ins. Co., 6 La. (O. S.) 185.

[28] Hurry v. London Assur. Co., 2 Bos. & P. 435.

ports during the course of the voyage, the same as if they had been on board the ship, where usage at the particular port of loading sanctions this way of taking the goods on board, though the policy only contains the customary clause, "Beginning the adventure on such goods from and immediately following the lading thereof on board the said vessel."[29] This clause last noted does not, however, as a rule, either in England [30] or here, cover the goods in transit in boats or lighters to the ship. If there be an established and notorious usage of trade of a place or port "to" which the goods are destined under the contract, or if the risk is to continue until the goods are "safely landed," the risk extends to and covers the goods in transit in boats, lighters, or launches to the shore, and goods are protected in boats employed in discharging goods as auxiliary to the legitimate purposes of the voyage insured.[31] Thus, where cattle are placed in boats according to the usual mode at that port of landing cattle, and some of them becoming frightened rush overboard, and are lost, the insurers are liable therefor.[32] If goods are insured to a specified port, and the vessel arrives at the roadstead, and in accordance with the custom of that place sends the cargo on shore in launches, the risk does not terminate until the goods arrive at the place of destination, although the town may be twenty leagues distant from the roadstead.[33] Goods may also be protected in lighters in which they are placed for transportation.[34]

[29] Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283. See, also, Hurry v. London Assur. Co., 2 Bos. & P. 435.

[30] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 423, *417; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 378.

[31] Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 381; Stewart v. Bell, 5 Barn. & Ald. 238; Matthu v. Potts, 3 Bos. & P. 23; Brown v. Carstairs, 3 Camp. 161; Parsons v. Massachusetts F. & M. Ins. Co., 6 Mass. 197; Tierney v. Etherington, 1 Burr. 348, per Lord Mansfield; Sparrow v. Carruthers, 2 Str. 1236; Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75; Henny v. Royal Exch. Assur. Co., 2 Bos. & P. 430; 3 Bos. & P. 388; 3 Esp. 289; Rucker v. London Assur. Co., 2 Bos. & P. 432, n.; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; Osacar v. Louisiana Ins. Co., 5 Mart. (La.) 386.

[32] Anthony v. Ætna Ins. Co., 1 Abb. (C. C.) 343.

[33] Osacar v. Louisiana State Ins. Co., 17 Mart. (La.) 386

[34] Houlder v. Merchants' M. Ins. Co., 17 Q. B. Div. 354.

§ 1570. Attachment of Risk—Substituted Goods—Goods Laden at Intermediate Port—Trading Voyages.—If it appears by a fair construction of the terms of the contract that a trading voyage is contemplated, the evident intent being that the ship shall be permitted to touch at several ports in the course of the voyage to unload goods or to take others on board, either in exchange for them or purchased with the proceeds thereof, goods so exchanged or purchased at any port at which the ship has liberty to touch and trade are substituted goods, and will be covered by the policy, and this extends to loading and unloading the goods at such intermediate port under such policies, such ports being deemed loading ports.[35] In determining this point, the whole policy should be construed together, and that construction given which is fairly deducible from its terms. The risk should not be extended beyond what the description fairly warrants. The liberty given must be always construed with reference to the voyage insured, and must be for some purpose contemplated by the insurance, and not for a purpose wholly foreign to the main object of the voyage insured.[36] If it is evident that no intention of unloading the cargo and employing it in trade is contemplated by the parties, the words giving liberty "to touch and stay at any ports or places whatsoever" will not extend the protection of the policy to goods shipped at an intermediate point; as in case the cargo is one of tea, and the policy stipulates that the adventure shall begin from the loading of the goods at a particular place, this will not cover goods shipped at an intermediate port where the vessel has stopped for repairs and has forwarded the first cargo by another vessel, even though the liberty to touch and stay has been stipulated.[37] A policy on all

[35] 1 Marshall on Insurance, ed. 1810, *142; Violett v. Allnutt, 3 Taunt. 419; Grant v. Delacour, 1 Taunt. 466; Barclay v. Stirling, 5 Maule & S. 6.

[36] Williams v. Shee, 3 Camp. 469, per Lord Ellenborough; Hunter v. Leathley, 10 Barn. & C. 858; 7 Bing. 517, per Lord Tenterden; Hammond v. Reid, 4 Barn. & Ald. 72.

[37] Grant v. Paxton, 1 Taunt. 463. The above general rule is in conformity with that given by Emerigon, who says that if the captain under such a policy discharges goods at an intermediate port and takes in others, the latter "stand in the place of sont sebrogées,

goods laden or to be laden during a specified time, with a privilege of extension by the assured, and no ports mentioned, is a policy upon a trading voyage, and attaches to substituted goods.[38] So in an English case, where part of the goods described in the policy were loaded at an intermediate port, the policy was held to have attached to the goods so laden to complete the voyage.[39] And it is not necessary that the port should be designated in the policy if it is comprehended by construction within the terms of the policy.[40]

§ **1571. Where Goods Subsequently Loaded at Intermediate Port are not Substituted Goods.**—If the risk has not commenced upon goods, by reason of their not having been loaded at the designated port, the policy will not attach upon goods subsequently loaded under a liberty to touch at other ports given by an indorsement made upon the policy under a mistake of law by both parties, arising from a mistake of the facts.[41]

§ **1572. Outward Goods and Proceeds Home—Attachment Risk.**—If the policy provides for an insurance upon outward cargo and the proceeds thereof home, if the outward cargo is discharged and the proceeds invested in a homeward cargo, the policy will attach thereupon and cover the same;[42]

or are substituted for those discharged there, and are covered by the policy." This author also says that if liberty be given the captain of touching at and making port in all places that he shall please, such liberty gives him the right of trading and making purchases at such ports, and the ports where the vessel stops become the place of loading, and that the insurance is valid although the entire loading insured may have been made at an intermediate port. He refers to a case where the insurance was on cargo out from Vinaros to Marseilles, liberty to touch at intermediate ports being given. The vessel departed from Vinaros, and took on board her lading at Alcanor, a roadstead belonging to Catalonia, and the policy was held to have attached: Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 8, pp. 558, 559.

[38] Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283.

[39] Violett v. Allnutt, 3 Taunt. 419.

[40] Hunter v. Leathley, 10 Barn. & C. 858; 7 Bing. 517.

[41] Scriba v. Insurance Co. of North America, 2 Wash. (C. C.) 107.

[42] Cleveland v. Fettyplace, 3 Mass. 391.

and this is so even though the proceeds home or return cargo is taken on credit before the outward cargo, which is left on consignment for sale, is actually sold, for the homeward cargo in such case is intended as a substitute for the outward cargo, and is to all intents and purposes the proceeds thereof.[43] So where a policy from Bordeaux to India stipulates that the risk shall end when the outward cargo shall be landed, and the proceeds entirely invested in produce of India, and a second policy is taken from India to a port of discharge in the United States, with liberty to stop and trade at the isles of France or Bourbon, or both, and the vessel disposes of part of the outward cargo at Sumatra for produce and of the balance at the isle of France, investing the same in homeward cargo, the second policy will attach.[44] But the identical goods constituting the outward cargo are not covered on the homeward voyage by the word "proceeds," unless a mercantile usage is proven to that effect, in which case the same goods will be included under an insurance upon the return cargo.[45]

§ 1573. "At and from"—Undisposed of Outward Cargo may be Protected by the Words "Wheresoever Loaded." Where an insurance is effected "at and from" on goods wheresoever they may be loaded, the effect of such clause will be to cover goods of the outward voyage undisposed of at the destined market, and which are necessitated being carried back on the homeward voyage, for the policy is to attach wheresoever the loading takes place.[46] But if the risk is to commence on goods to be loaded "at" a specified outport for the homeward voyage, the risk will not attach upon goods loaded at the port of

[43] "It is difficult to imagine how the underwriter can suppose that, whether the return cargo was procured by the sale or exchange of the outward cargo, or by a deposit of the outward cargo and a credit raised upon it, any difference as to his liability can exist," per Parker, C. J., in Haven v. Gray, 12 Mass. 71; Whitney v. American Ins. Co., 3 Cow. (N. Y.) 210.

[44] Cleveland v. Fettyplace, 3 Mass. 391.

[45] Dow v. Whelton, 8 Wend. (N. Y.) 160. See, also, Dow v. Hope Ins. Co., 1 Hall (N. Y.), 166.

[46] Gladstone v. Clay, 1 Maule & S. 420.

departure of the outward voyage and still remaining on board the vessel after her arrival at the outport.[47]

§ **1574. "At and from"—Outward Cargo to be Considered Homeward Interest, etc.—Loading "at."**—Where risk is to commence from the loading of the goods "at," and these words are qualified by the words "outward cargo to be considered as homeward interest twenty-four hours after her arrival at her first port of discharge," the voyage being a trading voyage, the word "loading" is here used in a sense different from that which ordinarily prevails, and does not refer to the mere putting on board "at," and the clause last noted will be construed to mean that the loading was to commence prior to the attaching of the policy "at," and the insurance, for the homeward voyage will attach to and cover the goods on board at once the twenty-four hours expire after the ship's arrival at her first port of discharge within the terms of the policy.[48]

§ **1575. Laden or to be Laden between Designated Points.**—If an insurance policy is issued for a specified term on cargo laden or to be laden on barges trading between points, it will attach upon and cover the described cargo whenever the same is taken on or delivered between the places designated, if the barges are engaged in trading between said places.[49]

§ **1576. Shipments to be Subsequently Declared—Risk Attaches in Order of Shipment—Usage to Correct Declaration.**[50]—If an insurance is effected on goods by ship or ships to be thereafter declared, or the policy provides "the several shipments to be subsequently declared," the risk attaches to the goods in the order in which and as soon as they are shipped. The insured, in such case, is bound to declare them in that order at once he knows of their shipment. But

[47] Rickman v. Carstairs, 5 Barn. & Adol. 651; 2 Nev. & M. 560; Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302.

[48] Joyce v. Realm Mar. Ins. Co., 7 L. R. Q. B., 580; 41 L. J. Q. B. 356; Tobin v. Hartford, 13 Com. B., N. S., 791; 34 L. J. Com. P. 239.

[49] Phœnix etc. Ins. Co. v. Cochran, 51 Pa. St. 143.

[50] See sec. 1736, herein.

if, by mistake or otherwise, a subsequent shipment is declared before a prior one, the insured is by usage bound to rectify the error, and this may be done even after a loss, there being no fraud, and the underwriter may require that the declarations conform to the order of the shipments.[51] And where goods are shipped under an open policy from Melbourne to London, by one set of steamers to Sydney and another set to London, and it is also stipulated that declaration be made within a specified time after departure from Sydney, two declarations must be made, one under the open policy and one under the contract; the former to identify the shipments at Melbourne, the latter to identify the goods actually shipped to London, it appearing that the policy covered certain goods in a certain factory at Sydney.[52]

§ 1577. The Insurance Applies to the First Voyage or the One Commenced.—Emerigon says the insurance in effect refers to goods which have been or shall be loaded on board the vessel, and that the insurance for the voyage means, if the ship is in port, the first or next voyage, but if the voyage be already commenced, the insurance concerns that voyage, and not a subsequent or different one, unless the contrary appears from the contract.[53] So if the insurance is upon certain merchandise from A to B on a steamer, the policy will not be extended beyond the first voyage the ship undertakes, and cover part of the described goods taken by the vessel on a second voyage.[54] And where the policy was from London to Berbice, and by its terms was to attach from the loading thereof of the goods aboard the ship, and the words "at sea" were inserted thereafter, the ship being represented as at sea between Barbadoes and Berbice, where she actually was when the policy was effected, and the vessel had prior thereto touched at Madeira, where she had discharged and taken on cargo and sailed,

[51] Stephens v. Australasian Ins. Co., L. R. 8 Com. P., 18, per the court.

[52] Davis v. National F. & M. Ins. Co. of New Zealand (Nov. 1891), H. of L. App. Cas. L. R. 485.

[53] Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 9, pp. 564, 565.

[54] Courtenay v. Mississippi Mar. & F. Ins. Co., 12 La. (O. S.) 233.

it was held that the policy attached at London; that the goods taken on at Madeira were not covered, and the insurers were released by the touching at Madeira.[55]

§ 1578. "At and from" a Specified Port—Commencement of the Risk from Loading, etc.—What is Port of Loading.—Under an insurance "at and from" a specified port, the question has been frequently before the courts as to what constitutes the port of loading under the usual clause providing for the commencement of the risk from and immediately following the loading thereof on "board ship at," or on "board ship" merely. The earlier English cases which have been followed by decisions in this country unequivocally decide that the clause in question excludes every other port than the one designated as the terminus a quo of the voyage, and that the goods must be loaded at the exact place specified, and no other, to enable the risk to attach thereon, and this is true even though the goods loaded elsewhere are the very goods intended to be insured, holding the parties strictly to the terms of the contract, without regard to the extrinsic evidence of a different intention, and the fact that there is no statement of the place where after the words "on board ship," does not warrant a more favorable construction, but on the contrary such fact is declared to afford more cogent reason for a strict construction.[56]

§ 1579. Cases Relied on in Support of the Last Rule. In case of a policy on goods "at and from Genoa, from the loading to equip for the voyage," the goods were loaded elsewhere, and the risk was held not to have attached.[57] Again, the pol-

[55] Redman v. London, 3 Camp. 503.

[56] Spitta v. Woodman, 2 Taunt. 416; 16 East, n.; Langhorn v. Hardy, 4 Taunt. 630; Robertson v. French, 4 East, 130; Gladstone v. Clay, 1 Maule & S. 423, per Bayley, J.; Hommeyer v. Lushington, 15 East, 46; Rickman v. Carstairs, 5 Barn. & Adol. 663; Mellish v. Andrews, 2 Maule & S. 106; Constable v. Noble, 2 Taunt. 403; Richards v. Marine Ins. Co., 3 Johns. (N. Y.) 307; Graves v. Marine Ins. Co., 2 Caines (N. Y.), 339; Vredenburg v. Gracie, 4 Johns. (N. Y.) 444, n.; Scriba v. Insurance Co. of North America, 2 Wash. (C. C.) 107; Park v. Hammond, 6 Taunt. 495; 4 Camp. 344; 1 Holt N. P. 80; Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302.

[57] Hodson v. Richardson, 1 W. Black. 463.

icy was "at and from Gottenburg . . . . from the loading thereof on board the said ship"; the goods were loaded at a prior port, and the risk was held not to have attached. The underwriters knew that the cargo had been loaded previously, and that the insurance was intended to protect said cargo, but this appeared by extrinsic evidence.[58] In another case the insurance was upon a trading voyage upon the ship and goods "at and from," the risk to commence "on the goods from the loading thereof twenty-four hours after her arrival on the coast of Africa." It was held that the cargo on board after that period and loaded elsewhere, being part of the out cargo, was not covered. The court's opinion in this case indicates very clearly the then tendency of the courts to adhere to a strict construction of the terms of the contract, since Lord Denman, C. J., declared that it appeared that the assured intended by the policy to insure both the outward and homeward cargo, but that unfortunately the words used would not effectuate the intention.[59] This case is on a line with the preceding one[60] in this respect: that the court felt constrained to uphold the contract in strict accordance with the express words used, notwithstanding the fact that the policy in question was in reality a continuation of a preceding policy, and was undoubtedly by the evidence intended by the parties to protect the cargo previously loaded. In another case, however, Lord Ellenborough relaxed this rule of strict construction, on the ground that it was apparent upon the face of the contract that it was intended to protect goods previously loaded at another port, since it was stated in the policy that it was in continuation of other policies, and said policies had been effected on the same cargo.[61] And in another case, while the court holds to a strict construction of the words so used, it is evident from the language employed by the court that had there been anything on the face of the policy or in the circumstances of the case to have warranted a

[58] Spitta v. Woodman, 2 Taunt. 416; 16 East, 188, n.; criticised in Bell v. Hobson, 16 East, 240; 3 Camp. 273, per Lord Ellenborough; and also in Carr v. Montifiore, 33 L. J. Q. B. 256, per Earle, C. J.

[59] Rickman v. Carstairs, 5 Barn. & Adol. 651.

[60] Viz., Spitta v. Woodman, 2 Taunt. 416; 16 East, 188.

[61] Bell v. Hobson, 16 East, 240; 3 Camp. 273.

different construction, it would have been given.[62] In Graves v. Marine Insurance Company[63] it was particularly specified that the risk should commence from the "loading on board said vessel at Vera Cruz." The ship was not able to discharge there, and returned with her outward cargo, and the risk was held not to have attached. Stress was placed upon the point that it might become important to know the condition of the goods at loading, distinguishing herein, however, the ship and the cargo, on the ground that the former was warranted seaworthy at the commencement of the risk, whereas no like warranty existed as to the goods. But whatever weight this distinction may carry, the words of Lord Ellenborough in an English case are pertinent. He says that although a construction favoring an attachment of the risk at a port other than that designated as the place of loading "at" might "probably aid in covering a damage which happened before the commencement of the risk, yet when we consider that the assured is bound to prove that the loss happened within the limits of the voyage insured, that difficulty is in a great measure removed." [64] In another English case, however, a similar reason for a like decision was urged as that in the New York case, viz., that the condition of the goods as to their state of damage or preservation prior to the attachment of the risk could not be known.[65] Again, a policy was on a cargo from Nuevitas to New York. The ship arrived but was not permitted to dispose of all her outward cargo there; the usual clause as to loading was contained in the policy and the risk was held to have never attached, as the policy was intended to cover only the goods loaded at Nuevitas.[66] But a policy on treasure bullion and bonds beginning the adventure from and immediately after the loading thereof at certain ports named, attaches thereon when the treasure is actually

[62] Grant v. Paxton, 1 Taunt. 463. See, also, Bell v. Hobson, 10 East, 240; 3 Camp. 273, per Lord Ellenborough; Carr v. Montifiore, 33 L. J. Q. B. 256, per Earle, C. J.

[63] 2 Caines (N. Y.), 339.

[64] Gladstone v. Clay, 1 Maule & S. 418.

[65] Hommeyer v. Lushington, 15 East, 46. See Hodson v. Richardson, 1 W. Black. 463.

[66] Richards v. Marine Ins. Co., 3 Johns. (N. Y.) 307.

on board for transportation at one of the specified ports, in possession of the messenger of the insured, whether it is taken on board at a port named or some other port in the course of the voyage. The policy in this case was an open or running marine policy, and also provided "risks applicable thereto to be reported to this company for indorsement as soon as known to the insured." [67]

§ 1580. Construction of Policy may Warrant Loading Elsewhere than "at" Designated Place.—The first inquiry should, in cases of this character, be directed to the point whether the designation of the terminus a quo or place "at" is intended strictly as a warranty that the goods shall be loaded "at" the specified place, or is intended as a mere description. It is true that the courts have, as a rule, been inclined toward a strict construction of contracts of marine insurance,[68] but nevertheless construction should not override the plain terms of the contract, and the intent of the parties deducible therefrom by means of those aids to construction which are legally available, nor, on the other hand, should courts by construction ingraft upon the words used an intention which the words themselves do not fairly import.[69] Again, a construction of the usual words which would of themselves require the loading to be at the port of departure for the voyage insured will not necessarily be exclusive, since a different intent may appear from a special memorandum, and be controlled thereby, or by circumstances showing that such construction was not intended in the particular case.[70] So that if the contract, fairly construed in accordance with sound principles of construction, evidences that the words used in such cases were not intended as a warranty, but only as a mere description, then such interpretation should govern, and the words should not be held a warranty. This conclusion substantially accords with the views of other text-writers, al-

[67] Wells v. Pacific Ins. Co., 44 Cal. 397.

[68] See sec. 205, herein.

[69] See sec. 209, herein.

[70] Clark v. Higgins, 132 Mass. 586, 593, per the court; citing Bell v. Hobson, 16 East, 246; Carr v. Montifiore, 5 Best & S. 408, 422; Nonnen v. Reid, 16 East, 176.

though it perhaps seemingly implies a more liberal rule than that stated by Mr. Arnould.[71] And the later English and American decisions evidence the fact that the courts will now favor, so far as the construction admits, a relaxation of the rule established by those decisions which hold that the goods are not protected if laden elsewhere than at the place designated. Thus, a policy on goods "at and from" a certain port without more, does not imply that the goods shall be loaded at that port; as in case of the insurance "at and from" B., from the loading thereof "at ——— as aforesaid."[72] The tendency of the courts in this direction is further evidenced from some of the cases noted herein under a prior section,[73] as well as in the cases cited below.[74]

§ 1581. Attachment of Risk on Goods "at and from." Unless it be provided otherwise in the policy,[75] the risk on goods "at and from" only attaches from the time the goods are laden on board the ship by which they are to be transported and subjected to a marine risk.[76] Under such a policy the risk does not all attach on the goods where the vessel is lost when proceeding to the port of loading for the purpose of taking in the cargo there awaiting shipment.[77] But usage

[71] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 426, *420, sec. 158; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 381, et seq. Mr. Maclachlan does not, however, use the words of Mr. Arnould given in Mr. Perkins' edition: 2 Parsons on Marine Insurance, ed. 1868, 50; 1 Phillips on Insurance, 3d ed., sec. 939, p. 516.

[72] Clark v. Higgins, 132 Mass. 586, 589; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73.

[73] Sec. 1579, herein.

[74] Joyce v. Realm Ins. Co., L. R. 7 Q. B. 580; Violett v. Allnutt, 3 Taunt. 419; Hunter v. Leathley, 10 Barn. & C. 858; 7 Bing. 517; Carr. v. Montifiore, 33 L. J. Q. B. 57; 256; 5 Best & S. 408, 425; Nonnen v. Kittlewell, 16 East, 176; Behn v. Burness, 3 Best & S. 751; Barclay v. Stirling, 5 Maule & S. 6; Manley v. United F. & M. Ins. Co., 9 Mass. 85. See next section.

[75] See Kentucky Co. v. Augusta etc. Co., 6 Gray (Mass.), 204.

[76] Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10; 2 Am. Dec. 130; Mellish v. Allnutt, 2 Maule & S. 106; Mobile M. etc. Ins. Co. v. McMillan, 31 Ala. 711; Folsom v. Merchants' etc. Ins. Co., 38 Me. 414; Cruder v. Philadelphia Ins. Co., 2 Wash. (C. C.) 262, per Washington, J.

[77] Halhead v. Young, 6 El. & B. 312; 25 L. J. Q. B. 290.

may warrant the risk attaching upon goods so soon as they are placed on boats for transportation to the ship,[78] and the risk attaches "at and from" on cargo and on freight from loading, even though the ship needs repairs to make her seaworthy.[79] If the insurance be "at and from," and there is no stipulation that the risk is to begin on taking in the cargo, the policy will attach upon goods previously laden at another port.[80] And although the insurance be "at and from" a foreign port, the rule first stated applies, and the risk attaches on the goods loaded, wholly or in part, for the homeward voyage, even though all the outward cargo has not been discharged, but a part thereof remains on board.[81]

§ 1582. "At and from" on Goods—Several Ports within One Legal Classification.—We have, under a prior chapter, given some consideration to this question, and the general principles there considered are applicable here, some of the cases relied on there being insurances on goods; the rule as to goods being that except usage warrant otherwise, the goods must be loaded "at" the particular terminus a quo, or place designated, and not a place which is geographically a separate port, and merely within the legal limits of the designated port.[82] Mr. Phillips' rule is broader than this, inas-

[78] Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283.

[79] Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Taylor v. Lowell, 3 Mass. 349. This last point has, however, been the subject of discussion and doubt. See sec. 1584, herein.

[80] Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Gardner v. Col. Ins. Co., 2 Cranch (C. C.), 473. In this case the fact was also considered that the goods were not laden subsequently to the ship's departure from the designated port, but, as we have already noted, goods so laden, as in case of substituted goods, may be covered. See secs. 1570-1575, herein.

[81] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 432, *427, sec. 161; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 388. This accords with the rule early stated by Emerigon, who says that goods insured may perish outward and inward, and notices a case where the ship was wrecked, having on board goods outward and inward, and the respective insurers of the goods were held liable: Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 20, pp. 592-94. See sec. 1586, herein.

[82] Section 1529, herein. See also, Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302; Park v. Hammond, 6 Taunt. 495; 1 Holt.

much as he included not only the port itself, but "such places as are comprehended as part of it." [83] Inasmuch as the cases relied upon by that learned author warrant the insertion of the words "by usage" after the word "comprehend," so that the clause would read, "such places as are comprehended by usage as a part of it," we may fairly and reasonably assume that this is what Mr. Phillips intended.

§ **1583. Goods on Board Ship or Ships—Certain Ports Named—Attaches at Port where Loaded, etc.**—If an insurance be upon goods or property on board ship or ships, and certain ports are named, the risk commences from the time the property is on board at one of the specified ports, or in fact at any port where the goods are loaded on board within the limits of the voyage. The policy should, however, be fairly construed upon this point, for the insured may necessarily be ignorant as to the exact port of loading, and the policy may designate certain limits; as in case of an island or district, without naming particular places. But the insurance will not cover goods loaded at a port clearly, and by fair and reasonable construction, not within the terms of the policy or the limits designated.[84]

§ **1584. Unloading and Reloading Goods to Make Vessel Seaworthy or for Other Purposes.**—While this question has been the subject of discussion and doubt,[85] it is held where a vessel is loaded for the voyage, and having sailed thereupon puts into a port of necessity for repairs, and unloads and reloads her cargo, the risk on the goods will attach at the place of original loading from the loading on board ship, and also at the place of reloading after the ship is made seaworthy;[86] and the same is true where, being found unseaworthy, she returns to port, discharges her cargo, and reships

[83] 1 Phillips on Insurance, 3d ed., 504, sec. 931.

[84] Wells v. Pacific Ins. Co., 44 Cal. 397; Hunter v. Leathley, 10 Barn. & C. 858. See Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 5, p. 139.

[85] See chap. on Deviation.

[86] Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56. See Carr v. Montifiore, 33 L. J. Q. B. 57, 256; 5 Best & S. 408, 425.

the same. And this applies to a risk upon ship, cargo, and freight, each being distinctly valued.[87] And the rule obtains where the goods are taken out on the quay for inspection by the customhouse officers and then reloaded.[88] But the mere taking the goods out of the vessel and putting them on deck, and afterward returning them in perfect order, is not a "loading thereof on board" at the designated port.[89]

§ 1585. Attachment and Duration of Risk on Goods —Abandonment and Change of Voyage Insured.[90]—If a cargo insured "at and from" is taken on board ship at the port of loading, the fact that the vessel sailed, merely intending to go first to a port other than that of its destination and thence to its port of destination, does not prevent an attachment of the risk. The intent of itself is not sufficient to prevent the risk attaching.[91] But if goods are insured to a specified port, it being represented that the voyage insured is to said port, but that the ship will clear for another port, and the cargo is in fact shipped for the latter port on the voyage to which the vessel sails, the policy does not attach upon the goods, even though she puts into the original port of destination to avoid the perils of the sea.[92] So if the original voyage insured is abandoned, the risk terminates.[93] But where the policy is on goods to a specified port, and the vessel clears for another port, but sails directly to the original port of destination, the insurers are liable. It appeared in this case, however, that a war risk was contemplated.[94]

§ 1586. Homeward Policy "at and from"—Case of Island or District—From the Loading Aboard Ship "at" Port or Ports.—In case of an insurance "at and from" several

[87] Taylor v. Lowell, 3 Mass. 331; 3 Am. Dec. 141.

[88] Nonnen v. Reid, and Nonnen v. Kittlewell, 16 East, 176.

[89] Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302. "The hoisting the cargo out of the hold of the ship and restowing it does not amount to loading it on board the ship, either according to the words, the reason, or the spirit of the contract," per Van Ness, J.

[90] See secs. 1488, 1531, herein.

[91] Marine Ins. Co. v. Tucker, 3 Cranch (U. S.), 357.

[92] Forbes v. Church, 3 Johns. (N. Y.) 159.

[93] Tasker v. Cunningham, 1 Bligh, 87. See Wooldridge v. Boydell, 1 Doug. 16.

[94] Planché v. Fletcher, 1 Doug. 251.

ports[95] within a specified district "from the loading thereof aboard ship at" port or ports, or where the risk for the homeward voyage is from an island or place with several ports, the homeward cargo which is loaded on board ship is protected from the time of loading aboard ship, even though the ship has not discharged all her outward cargo, and even though the homeward cargo be not completed, but the ship is proceeding to another port to complete her homeward cargo.[96] But the cargo must have been laden for the homeward voyage, since the risk in such cases does not attach upon any cargo not so laden, nor does it attach if no homeward cargo is laden.[97]

§ 1587. Duration of Risk—Liberty to Make Port or Ports—Insurance to Several Ports, Island or District.—The words "with liberty of" a certain port only confer a power subordinate to the general course of the voyage; they do not necessarily imply that a trading voyage is intended, nor unequivocally intimate the nature of the cargo insured, nor do they evidence that the parties contemplated such port as that at which the voyage was intended to terminate.[98] And in case of an insurance from A to B, with liberty "to touch at intermediate points, with the privilege of coasting and transacting any lawful business connected with the voyage," B is the place of termination of the risk, and not an intermediate point where, according to custom, the ship remains several days in order to effect sales, and then drops down to B to deliver the goods, and this is so even though said place is the usual market where sales of like cargo are negotiated, and all the hands except two were there discharged and paid off. It appeared, however, in this case that said market place was a separate municipality.[99]

[95] See sec. 1581, herein.

[96] Forbes v. Aspinall, 13 East, 323; Tobin v. Hartford, 13 Com. B., N. S., 791; 34 L. J. Com. P. 37; 32 L. J. Com. P. 134; Robertson v. French, 4 East, 130; 4 Esp. 246; Camden v. Cowley, 1 W. Black. 417; Warre v. Millar, 4 Barn. & C. 538.

[97] Robertson v. French, 4 East, 130; 4 Esp. 246; Halkead v. Young, 25 L. J. Q. B. 290; 6 El. & B. 312.

[98] Allegre v. Maryland Ins. Co., 8 Gill & J. (Md.) 190; 29 Am. Dec. 536.

[99] Grant v. Lexington Ins. Co., 5 Ind. 23; 61 Am. Dec. 74.

And where an insurance was from New York to Barracoa, with liberty to touch at one or two ports on the north side of Cuba, the risk to continue till the goods were safely landed at one of said ports, the fact that the ship breaks bulk at Barracoa does not terminate the risk, where she is unable to dispose of her cargo there and sails for Havana.[100] If goods are insured to an island or district or place containing several ports, the risk on the outward cargo continues until the same is wholly, or the great bulk thereof, safely discharged at a place in said island or district which is specified as the port of discharge, or which is evidently intended as the ultimate place of discharge. If only a portion of the cargo is discharged at any port, so that departure for another port or the contemplated ultimate port is really a continuance of the outward voyage, the risk will not terminate by reason of such part discharge of the cargo, but if the remnant of the cargo on board is only trifling in quantity with relation to the whole, or is retained merely as ballast, the risk will be terminated.[101] The fact, however, that a certain port is named or intended as the ultimate port of discharge does not control, since if the cargo be wholly, or the great bulk thereof, safely landed and discharged at a substituted port, the risk will there terminate.[102] If the risk be to one of two ports in the alternative, the risk terminates at the first of said ports at which the vessel arrives, notwithstanding a former cus-

[100] Gilfert v. Hallett, 2 Johns. Cas. (N. Y.) 296.

[101] Stocker v. Harris, 3 Mass. 406; Barrass v. London Assur. Co., and Leigh v. Mather, both reported in 1 Marshall on Insurance, ed. 1810, *266, *267. The last case is reported in 1 Esp. 412, somewhat differently, and as there reported does not support the rule: Moore v. Taylor, 1 Ad. & E. 25; Upton v. Salem Commercial Ins. Co., 8 Met. (Mass.) 605; Richardson v. London Assur. Co., 4 Camp. 94.

[102] See Moffat v. Ward, 4 Doug. 31; Shapley v. Tappan, 9 Mass. 20; Ellery v. New England M. Ins. Co., 8 Pick. (Mass.) 14. The above rule conforms with that stated by Emerigon, for he says that in case of insurances on the cargo to the Levant, or to the French isles of America, with a clause to make ports, "the risk on the cargo is at the charge of the insurers until the goods insured are entirely, or almost entirely, discharged at a place in the Levant or in the French islands," but he instances a case which forms the exception, where the stipulation was "the insurers to be free at the place of entire discharge." In this instance the vessel did not entirely discharge her cargo, and the risk did not determine; Emerigon on Insurance, Meredith's ed. 1810, c. xiii, sec. 18, pp. 586-89.

tom between the parties to put into said port and proceed thence to the latter port.[103]

§ **1588. Attachment of Risk from a Port from Loading—Duration of Risk—Usage.**—If an insurance be effected on goods from a certain port by a specified steamboat under the usual clause as to loading on board ship, the risk commences when the goods are put on board, and continues until they reach the usual place in the specified port of discharge and are there delivered in the course of that trade, unless it is proved that, according to the custom and usage of underwriters and persons concerned in the insurance business at the place where the contract was made and at the time it was made, the name of the port, when used in such a contract, was understood to mean, and did mean, the usual place of unloading the boat in the course of that trade.[104]

§ **1589. To Specified Port—Anchoring Outside of Harbor.**—If the insurance be on goods, and the custom is for vessels to anchor outside the bar and send up the cargo in launches, the risk continues until they are discharged at the very place of destination of the cargo, and this was so held where the town was twenty leagues from the usual place of anchorage.[105] So if the goods are safely landed at the lazaretto, which is the usual and customary place of discharging, the insurance terminates.[106] So the vessel may put into the nearest practicable port where the place of discharge is not of sufficient depth for a vessel of like draught, and may land the goods.[107]

[103] Dodge v. Essex Ins. Co., 12 Gray (Mass.), 65.

[104] Mobile M. etc. Ins. Co. v. McMillan, 31 Ala. 711, 723; citing Mallan v. May, 13 Mees. & W. 511; Parr v. Anderson, 6 East, 207; notes to Wigglesworth v. Dallison, 1 Smith's Lead. Cas. 677-81; Smith's Mercantile Law, 325; 1 Duer on Marine Insurance, ed. 1845, 185, et seq. Examine Thelluson v. Ferguson, Doug. 346; Sellar v. M'Vicar, 4 Bos. & P. 23; Audley v. Duff, 2 Bos. & P. 111.

[105] Osacar v. Louisiana State Ins. Co., 17 Mart. (La.) 386; Cockey v. Atkinson, 2 Barn. A Ald. 460.

[106] Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75; Brown v. Carstairs, 3 Camp. 161.

[107] Stewart v. Bell, 5 Barn. & Ald. 238. See sec. 1569, herein, as to lighters.

§ 1590. Till Safely Landed—Final or Last Port of Discharge.[108]—Under the usual form of policies providing for the continuance of the risk on goods until they are discharged and safely landed, the risk continues until the goods reach the usual or customary landing places or places of discharge in the specified port of destination, or in the port contemplated by the parties as such, and are there safely landed; that is, the risk terminates at once the goods are there put on shore or on the ordinary wharves and quays, in conformity with custom or usage, unless by usage the name used to designate the port is shown to mean not the usual place of unloading, but some other.[109] The fact that the goods are not delivered to the consignee, or that he is unable to immediately obtain possession of them, does not change the rule.[110] And if goods are insured to a certain place, and the goods are safely landed at a port distant from the city to which ships usually come, and there discharge their cargo, this constitutes a safe landing of the goods.[111] But this rule does not preclude landing the goods for temporary purposes warranted by usage or otherwise,[112] and if the goods are discharged under the inspection of government officers and warehoused, they are discharged and safely landed;[113] and the risk is terminated and the goods landed, within the intent of the policy, where they are sold on board the ship and without unloading upon her arrival at her port of delivery, and the purchaser contracts for freight to

[108] See sec. 1588, herein.

[109] Mobile D. etc. Ins. Co. v. McMillan, 31 Ala. 711, 723, per the court; Barrass v. London Assur. Co., reported in 1 Marshall on Insurance ed. 1810, *266, per Lord Mansfield; Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75; Gatcliffe v. Bourne, 4 Bing. N. C. 314; 3 Man. & G. 643; 7 Man. & G. 850; Matthu v. Potts, 3 Bos. & P. 23; Brown v. Carstairs, 3 Camp. 161; Hyde v. Trust etc. Co., 5 Term Rep. 397; Mansur v. New England Ins. Co., 12 Gray (Mass.), 528; Fletcher v. St. Louis M. Ins. Co., 8 Mo. 193; Tierney v. Etherington, cited in 1 Burr. 348.

[110] Gatcliffe v. Bourne, 4 Bing. N. C. 314; 7 Man. & G. 850; Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75. See Fletcher v. St. Louis M. Ins. Co., 18 Mo. 193.

[111] Tierney v. Etherington, cited in 1 Burr. 348, per Lee, C. J.; Mobile M. Dock etc. Ins. Co. v. McMillan, 27 Ala. 77.

[112] See sec. 1565, herein.

[113] Brown v. Carstairs, 3 Camp. 161.

another port, for this is a contract de novo.[114] But the goods may, by express stipulation, be protected after they are landed.[115] If the goods are insured to the last place of discharge in an island, and the cargo is discharged at one of the ports of the island and takes in ballast, the risk terminates outward, and the fact that a part of the cargo is reloaded for another market does not change the rule.[116] And where cargo and freight are insured to several ports, or to a final port of discharge, with liberty to wait at one of said ports a specified time, the risk determines when the vessel waits the designated period at the specified port.[117] So where goods are insured to a "final port of destination," the question as to what is that final port may be dependent upon the circumstances of the case or usage, the main point being to arrive at the intention of the parties.[118]

§ 1591. Goods Partly Landed—Whether the Risk is Entire.—There has been some conflict of opinion upon the point whether the risk is so far divisible that the safe landing of a part of the goods at the usual place of discharge terminates the risk as to them. It is decided in Massachusetts that the risk terminates as to those goods which are landed; in other words, that the risk is severable.[119] The same rule ob-

[114] 1 Marshall on Insurance, ed. 1810, *258, and Leigh v. Mather, therein reported, *266.

[115] Rodocanachi v. Elliott, L. R. 8 Com. P. 649.

[116] Richardson v. London Assur. Co., 4 Camp. 94.

[117] Doyle v. Powell, 4 Barn. & Adol. 267; 1 Nev. & M. 678.

[118] Oliverson & Brightman, 15 L. J. Q. B. 274.

[119] Mansur v. New England Ins. Co., 12 Gray (Mass.), 520. In this case the court said: "This rule respecting the delivery of the cargo must, in the absence of any stipulation intended to control it, apply to each part and parcel, as well as to the whole of the goods. The entire delivery of a cargo of provisions or of any other property consisting of separate parcels cannot all be effected in the same moment of time. But as often as separate parcels are landed upon the wharf where the landing is to constitute a delivery, the power over the goods no longer remains in the master of the ship, but is transferred at once to the consignee, or to some intermediate agent who thenceforward is to act for him. The master having thus discharged his duty is thereby relieved from all further obligation to look after and protect the goods, and the marine risk, which in its nature is to continue only during the transportation and landing of the goods insured, must necessarily have the same termination."

tains in the United States supreme court,[120] and also in Alabama;[121] likewise in Louisiana.[122] In Missouri, however, part of the insured goods were put out upon the levee upon the ship's arrival at St. Louis, which was her port of destination, and the remainder of the goods on board ship, together with those on the levee, were destroyed. The consignees had been notified of the arrival, and were at the levee when the cargo was being landed, and it was held that the risk was entire, since the insurer could not split up his liabilities or the insured's rights; that the carrier's obligation was to land the cargo within the time permitted by the terms of the contract, and that the carrier must deliver them, which contemplated his discharging himself as common carrier of the custody of the goods.[123] On a line with this decision a part of the goods had been landed over the twenty-four hours specified as that of the duration of the risk after the goods were landed, when they with the undischarged cargo were seized as illicit, and the risk was declared entire and the insurers liable, it being held that the specification of twenty-four hours meant until that time after all the goods were landed.[124] It is also laid down as a general rule under the English decisions that the words "until discharged and safely landed" protects the goods until the bulk, or the whole of them, are discharged and safely landed at the port where the ship breaks bulk for the purpose of discharging the goods.[125] The true rule supported by the weight of authority would seem to be that the goods are protected on board ship or in boats or lighters, to be landed according to custom, until the whole or the bulk of them are discharged and safely landed at the usual place for discharging goods at the port of destination specified or contemplated as the ultimate port of discharge, and that goods on shore are not protected, whether they be the bulk or the whole of the cargo, or only a

[120] Gracie v. Maryland Ins. Co., 8 Cranch (U. S.) 84.

[121] Mobile Dock & Mut. Ins. Co. v. McMillan, 27 Ala. 77.

[122] Osacar v. Louisiana State Ins. Co., 17 Mart. (La.) 386.

[123] Fletcher v. St. Louis M. Ins. Co., 18 Mo. 193.

[124] Gardner v. Smith, 1 Johns. Cas. (N. Y.) 141.

[125] Clason v. Simonds, 6 Term Rep. 533. The Guidon required the delivery of the goods safely at the quay to the consignees or their agents or by usage as soon as the merchandise "passed under the

part thereof; or if the policy provides that the risk on the goods shall continue a specified time after they are landed, then the risk terminates as to those landed at the specified time, and therefore the risk is severable.[126]

§ **1592. Within what Time Goods Must be Landed.**— The clause "covering goods until they are safely landed" contemplates a discharge of the cargo within such a reasonable time as they can be conveniently and safely landed after the arrival of the ship at the ultimate port of delivery at the usual place for discharging. It is not a reasonable construction that the insured has power to prolong the risk indefinitely at his own pleasure or by unnecessary delay. The question as to what is a reasonable time is dependent upon usage, upon the customs of a particular trade, upon particular circumstances, as well as upon the character and purpose of the voyage insured as in case of fishing or trading voyages.[127] It is sometimes expressly stipulated in policies that a reasonable time shall be allowed to discharge the cargo,[128] or that the risk shall continue a certain number of days after arrival, or that a specified time shall be allowed for discharging.[129] And in case of inland navigation, where three days are given within which to discharge the cargo in case the voyage is stopped by ice, the time for discharging should be computed from the actual stoppage.[130] The risk will continue, although the goods are kept on board several days after arrival, where the custom of that particular trade warrants it.[131]

king's weights," but Emerigon says this is "foreign to the insurers," since they are not bound "for that which has happened on shore": Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 48, pp. 525, 526.

[126] See 1 Phillips on Insurance, 3d ed., 539, sec. 973.

[127] 1 Marshall on Insurance, ed. 1810, *257, and Parkinson v. Collier, reported therein; Vallance v. Dewar, 1 Camp. 503; Noble v. Kennoway, Doug. 510.

[128] So in Fletcher v. St. Louis M. Ins. Co., 18 Mo. 193.

[129] Noble v. Kennoway, Doug. 492.

[130] Sherwood v. Mercantile Mut. Ins. Co., 66 N. Y. 630. See next section.

[131] Noble v. Kennoway, Doug. 492.

§ 1593. Termination of Risk—Voyage Stopped or Delayed by Ice—Inland Navigation.—If the cargo on a canal boat be insured, with a provision that if the voyage cannot be completed that same season by reason of ice or the closing of navigation, the risk shall terminate, three days being allowed for the discharge of the cargo, the voyage can only be stopped by the act of the master or causes making further progress impossible. Mere delays from obstructions by ice, although coupled with the impossibility of completing the entire voyage, are not sufficient, nor do they preclude the right to continue the voyage to a proper place where the cargo may be safely discharged and the boat laid up for the season, and the three days for discharging only commence to run from the time of actual stoppage.[132] And although under a similar policy upon the cargo the boat is actually frozen in and the canal declared closed by the canal commissioners, this is not such a stoppage by ice as to terminate the risk where a channel is thereafter cut and the boat towed to its destination within the same season, and in such case, if the boat is sunk upon its arrival, the insurers are liable.[133]

§ 1594. Risk Terminates where Goods are Transshipped without Necessity or Agreement.—The settled rule is that if insured goods are reshipped or shifted, without necessity, from a named ship on which they are insured to another, the risk is thereby terminated, unless the insurance company assents to the reshipment.[134] And this accords with the rule stated by Emerigon, who says: "If the change of vessel is made during the course of the voyage without necessity, and without the consent of the insurers, they will be discharged from the risks . . . . ; so soon as without necessity the thing insured is placed in another vessel, the contract is dissolved ipso jure," and also "that without their consent and without necessity they [the insurers] could not be made to run the

[132] Sherwood v. Mercantile Mut. Ins. Co., 66 N. Y. 630.

[133] Delahunt v. Ætna Ins. Co., 97 N. Y. 537 (two judges dissenting).

[134] Malinckrodt v. Jefferson F. Ins. Co., 1 Mo. App. 205. See, also, Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467; 44 Am. Rep. 61.

risks on another vessel, although larger and better."[135] So it is declared in a California case that it is an implied condition of marine insurance of freight that the ship shall not be changed without necessity or consent. In this case wheat was insured on a certain steamer "and connections" from San Francisco to Hongkong. It was the custom to carry without transshipment, but here the cargo was unnecessarily transferred to other ships of the same company at Yokohama, and conveyed to Hongkong, where it was lost. It was decided that "connections" meant regular connections, and not an unusual substitution unanticipated at the time of the issuing of the policy, and that the policy was avoided.[136] A delay of twelve days in transportation of insured cargo, occasioned by waiting for necessary repairs, will not justify transshipment of cargo in another vessel. By such transshipment the insurers are discharged from liability for loss subsequently happening to the cargo in the new bottom.[137]

§ **1595. Risk does not Terminate where Goods Transshipped from Necessity.**—If through necessity the goods insured on board a certain ship are transshipped or changed to another vessel for safe transportation to the original port of destination, the risk continues on said goods in the substituted ship until they are safely landed at said port. In brief, the fact that the goods are reshipped through necessity, as where the ship is disabled and cannot complete her voyage, does not terminate the risk.[138] The distinction here made is also made by Emerigon, who says: "If in the course of the voyage, and in consequence of a peril of the sea, the captain is obliged to hire another vessel to transfer on board of her the goods in-

[135] Emerigon on Insurance, Meredith's ed. 1850, c. xii. sec. 16, pp. 339-41, et seq.

[136] Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467; 44 Am. Rep. 61; 66 Cal. 294.

[137] Salisbury v. Marine Ins. Co., 23 Mo. 553; 65 Am. Dec. 687.

[138] Plantamour v. Staples, 1 Term Rep. 611; 3 Doug. 1: 1 Marshall on Insurance, ed. 1810, *249; Bryant v. Commonwealth Ins. Co., 13 Pick. (Mass.) 543, 555; Ludlow v. Col. Ins. Co., 1 Johns. (N. Y.) 335. See De Cuadra v. Swann, 16 Com. B., N. S., 772; Dick v. Barrell, 2 Str. 1248; Columbian Ins. Co. v. Pierce, 14 Allen (Mass.), 320.

sured, the insurers will run the risk on the goods until their disembarkation at the place of destination." [139] And in cases of necessity, where the goods saved are transshipped and the voyage is a trading voyage, the risk continues on the produce thereof reshipped from necessity on a third ship.[140]

§ **1596. Risk does not Terminate when Transshipment is by Agreement.**—By agreement goods can be transshipped as upon arrival at a specified place, thence to be transported in other vessels to the port of destination.[141] So where the vessel sustains injury before loading, the insurers may consent to a transfer of the risk to another ship; in such case, where the policy is to run a specified number of days, the delay caused by changing ships and transshipping is not to be counted in the specified period of duration of the risk.[142] And where goods are transshipped by agreement, with liberty to put them on board one or more ships upon arrival at a certain port, and there are no ships there except a storeship, which was by custom always considered a warehouse, the risk continues on said goods while in said storeship, in which they have been placed to await the arrival of the ships.[143] So insurers may be liable for accident to stock while being transshipped.[144] Thus insurers of safe carriage of stock are liable for accident to the stock while being transshipped from cars to a boat, under a policy which covered, with the usual exceptions, the perils of railway and river, and by special indorsement fixed the places of shipment and destination and the route to be taken.[145] And under this head of transshipment by consent it may be stated that usage may undoubtedly, in certain cases, warrant, or perhaps necessitate, a transshipment of goods.

[139] Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 16, pp. 339, 340.

[140] Plantamour v. Staples, 1 Term Rep. 611; 3 Doug. 1. But see Ludlow v. Col. Ins. Co., 1 Johns. (N. Y.) 335.

[141] Tierney v. Etherington, cited in 1 Burr. 348; Bold v. Rotherham, 15 L. J. Q. B. 279; Plant v. Eufalia Home Ins. Co., 41 Ga. 130.

[142] Plant v. Eufalia Home Ins. Co., 41 Ga. 130.

[143] Tierney v. Etherington, 1 Burr. 348.

[144] Ætna Ins. Co. v. Stivers, 47 Ill. 86.

[145] Ætna Ins. Co. v. Stivers, 47 Ill. 86; 95 Am. Dec. 467.

§ 1597. Termination of Risk — Outfits of Whaling Voyage.—An insurance on outfits of a whaling voyage does not terminate pro tanto with their consumption or distribution, but attaches to the proceeds of the adventure.[146] In case of an insurance on the outfits of a whaling ship, with liberty of ports and to ship home catchings at the risk of the insured, the catchings may be shipped home without diminishing the valuation specified in the policy, but as to that part which is sent home, the risk terminates.[147]

§ 1598. Till Arrival of Goods to a Market at Final Port of Discharge.—If outward goods are insured till their arrival to a market at their final port of discharge, they will be protected till they are finally disposed of at some foreign market.[148]

§ 1599. Termination of Risk by Consignee or Owner Taking Possession—Consignees—Lighters.—If the goods are delivered into the consignee's or assured's possession, or he takes them under his own care and management, or completely accepts them, the risk is determined, even though they would otherwise have been at the risk of the insurer; as in case the goods are put into lighters of the insured, and they are in his possession and completely accepted by him, the risk ceases.[149] And where they are brought in the usual way, according to the customs of that port, in public lighters to the

[146] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132.

[147] Mutual M. Ins. Co. v. Munro, 7 Gray (Mass.), 246.

[148] Richardson v. London Assur. Co., 4 Camp. 93, per Lord Ellenborough.

[149] Sparrow v. Carruthers, 2 Strange, 1236, commented upon in Hurry v. Royal Exch. Assur. Co., 2 Bos. & P. 430; 3 Esp. 289. The rule above given, however, is deduced not alone from the case of Sparrow v. Carruthers, but from that case in connection with the opinions and decisions of other courts: Rucker v. London Assur. Co., 2 Bos. & P. 432, per Buller, J.; Low v. Davy, 5 Binn. (Pa.) 595; North of England P. O. C. v. Archangel M. Ins. Co., L. R. 10 Q. B. 249; Bold v. Rotherman, 8 Q. B. 797; Strong v. Natally, 1 Bos. & P. N. R. 16. "It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured; but this is not because in such a case the risk is terminated by an actual landing,

wharf, and, owing to the roughness of the weather and the evening, they cannot be landed, the risk ends by the insured telling the lighterman that he need not stay, and that he will look to the landing thereof himself.[150] This rule, however, is subject to such qualification as may arise from usage; as where it is customary to employ public lightermen to effect the discharge, the fact that the consignee or assured employs them for that purpose does not constitute a delivery to him, nor a taking into his possession and control, and the risk is not thereby terminated.[151]

SUBDIV. II. Attachment and Duration of Risk on Freight.

§ **1606. Attachment and Duration of Risk on Freight —Generally.**—The first distinction to be observed herein is between freight which is the compensation for the carriage of goods in the ship, and chartered freight, which is the price paid the owner as charter money under a contract of affreightment, whether for the ship or for a part thereof, as in case of a part owner for a certain time or a certain voyage.[152] In case of an insurance upon freight, where a price is to be paid for the carriage of goods in the ship, there are two extremes: 1. An inchoate right to freight; and 2. The consummation of that right. In other words, it is necessary, in order to determine whether the risk on freight attaches, to ascertain whether the insured has such an inchoate right to freight as that it would be in all reasonable probability have been earned had not a peril insured against intervened, and at what point of time he was so situated. This point of time must be determined largely by circumstances, since a positive rule of law is not applicable to every case. At the other extreme, the risk will determine, so that the insurer can have no further risk nor interest concerning the freight insured from that point

but because the consignee waives the landing and himself terminates the risk, instead of taking delivery short of the land": Houlder Bros. v. Merchants' M. Ins. Co., Lim., 6 Asp. Rep. Mar. Cas., N. S., 12, per Bowen, L. J.

[150] Strong v. Natally, 1 Bos. & P. N. R. 16.

[151] Hurry v. Royal Exch. Assur. Co., 2 Bos. & P. 430; 3 Esp. 289.

[152] See secs. 1009, 1010, herein.

of time when the freight shall have been earned. In the case of freight generally there are two material factors which must be so relatively situated, with reference to the earning of freight and the ship, as to create a well-grounded expectation of freight being earned. A mere probability or reasonable expectation is not of itself sufficient, while in chartered freight no goods may ever be put on board the ship, nor be contracted for or ready to be shipped. In many instances the termination of the risk on goods may be simultaneous with the ceasing of the risk on freight generally; as in cases where the goods are wholly or partly discharged and safely landed and the freight earned or partly earned, So the risk may attach both on the goods and on the freight from the loading thereof aboard ship, but the freight will attach before that time in frequent instances. In the case of chartered freight the main inquiry is at what point of time the inchoate right to such freight accrues, and to this point of time must be referred the attachment of the risk, since if the assured be in a condition to earn his freight under the charter-party, and is prevented therefrom by the voyage being stopped by a peril insured against, he is entitled to recover the loss.[153] It may be stated that the nature of the contract of insurance on freight is that the goods shall arrive at the port of delivery, notwithstanding the perils insured against.[154] So in case the shipowner has made a lawful and valid contract of affreightment, the owner's interest in freight has accrued if the ship is in the proper place and ready to receive the cargo.[155] It is

[153] For an affirmance of the above general principles, see M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J.; Forbes v. Aspinwall, 13 East, 324; per Lord Ellenborough; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 13; Thompson v. Taylor, 6 Term Rep. 478, per Rawle, 107; Davidson v. Willusey, 1 Maule & S. 315, per Lord Ellenborough and Laurence, J.; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 143, per Shaw, C. J.; Barber v. Fleming, L. R. 5 Q. B. 59, per Cockburn, C. J., and Blackburn, J.; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Davy v. Hallett, 3 Caines (N. Y.), 19, per Kent, J.; Curling v. Long, 1 Bos. & P. 636, per Eyre, J.

[154] De Wolf v. State Mutual F. & M. Ins. Co., 6 Duer (N. Y.), 191, per the court.

[155] Gordon v. American Ins. Co., 4 Denio (N. Y.), 360; Williamson v. Innes, 8 Bing. 31, n.

also contemplated by an insurance upon freight that the goods shall arrive at the port of destination or delivery, and if they are destroyed by the perils of the sea the insurer is liable.[156]

§ 1607. The Case of Tonge v. Watts.—The case of Tonge v. Watts, reported in Strange,[157] was at nisi prius, and Lord Lee, C. J., ruled thereon that as the goods were not actually on board the ship at the time of loss, the right to freight had not commenced. From this decision Mr. Marshall deduces the rule that the risk in freight does not commence till the goods are on board, although he qualifies it by saying the risk generally begins from that time.[158] And the court in a Pennsylvania decision says that Tonge v. Watts "settled long ago that although the goods are ready to be loaded, yet if none of them are actually on board, and the vessel is driven from her moorings and lost, there can be no recovery on an insurance on freight." [159] So in Thompson v. Taylor[160] Lord Kenyon, C. J., says that "in the case in Strange, the inception of the contract would have been the taking of the goods on board, but as the loss happened before the goods were put on board, there was no inception of the contract"; and Grose, J., in the same case, declares that the right to freight had not commenced in the case in Strange, because the goods were not on board the ship. Lord Kenyon, C. J., however, distinguishes the case before him, which was one of chartered freight, from the Strange case, saying the latter rested upon peculiar circumstances, and he decided in favor of the plaintiff for a recovery of the freight upon the same principle, as he declared, upon which the case in Strange was decided, and the principle underlying the case before him was, "that if the contract had its inception, if anything were done under it by the plaintiff, ... his right to freight commenced": and "as the plaintiff had begun to perform his part of the contract,

[156] De Wolf v. State Mut. F. & M. Ins. Co., 6 Duer (N. Y.), 191.

[157] 2 Str. 1251.

[158] 1 Marshall on Insurance, ed. 1810, *278.

[159] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97, per Huston, J.

[160] 6 Term Rep. 478.

as he had done something under it which, if matured, would have entitled him to his freight," he could recover. It is further evident that Lord Kenyon did not consider the point as to the goods being actually on board ship as controlling, and that he was inclined to adhere rather to what he considered the principle of the case in Strange, than to the ruling of Lord Lee, C. J., therein, from the fact that he directed a verdict for the plaintiff for the whole freight in another case where only a part of the cargo was shipped at the time of loss.[161] In a line with the principle indicated by Lord Kenyon as underlying the case in Strange, and relying upon said case, Mr. Phillips deduces the rule that "the ship must be ready, and something must have been done . . . . toward earning freight," and in another section he says that "a contract for freight gives an insurable interest so soon as the ship is ready to take it," relying for this latter rule upon Thompson v. Taylor,[162] and the words of Lord Kenyon therein.[163] It will be observed that Mr. Phillips incorporates in his rule based by him upon these two cases the principle deduced from the case in Strange by Lord Kenyon, and also the additional factor of the ship being ready to receive the freight. So Mr. Maclachlan says of the case in Strange that "although the cargo was ready, the ship was not, and consequently both were not then, in fact of law, in that relation proper and necessary to the earning of freight, so that the risk had not commenced. This, as the law now stands, seems to be the principle of the case, and not the absence of the goods on board, although that is said to have been the ratio decidendi." [164] The principle involved in the Strange case was clearly this: That the ship and the goods must be so relatively situated, with reference to the earning of freight, as to create a well-grounded expectation of freight being earned, and since the ship was not ready to receive the goods, an inchoate right to freight had not accrued, and the decision was right, both upon principle and under the facts. If, however, the words of Lord Lee, C. J., in this case be held

[161] Montgomery v. Eggington, 3 Term Rep. 362.

[162] 6 Term Rep. 478.

[163] 1 Phillips on Insurance, 3d ed., 185, 186, secs. 329, 332.

[164] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 433.

to establish in the abstract an unqualified rule that the goods must be actually on board the ship, otherwise the risk on freight will not commence, then that such a rule thus unqualifiedly stated is not law and the case is not an authority is well settled, for it would exclude the right to freight on goods contracted for and ready to be shipped, the ship being ready to receive them. That the principle above stated, as established by the case of Tonge v. Watts, is in conformity with the law governing in like cases at the present time, will also be apparent from the cases hereafter noted under this chapter.

§ **1608. Risk on Freight will Only Attach from Loading of the Vessel where so Stipulated.**—If the contract expressly stipulates that the insurance on freight is to begin from the loading of the vessel, the risk will not attach as to the freight until the goods are aboard,[165] notwithstanding the preceding words of the policy would, if the clause as to loading had not been used, have brought the risk, as to the time of its attachment under a different rule;[166] and the rule obtains even though the ship is lying in port at the proper place ready to receive the cargo engaged for her.[167] But a complete loading is intended by such clause,[168] and although the insurance is upon chartered freight, if the goods are completely loaded the risk attaches as to the freight, irrespective of the fact whether the vessel has broken ground for the chartered voyage or not.[169] In an English case it appeared that a policy was issued upon "freight of meat at and from Montevideo," to certain ports in the River Platte, and thence to the United Kingdom. The policy also declared that the underwriters should be liable for such losses as might be caused by the breaking

[165] Jones v. Neptune M. Ins. Co., L. R. 7 Q. B. 702; Gordon v. American Ins. Co., 4 Denio (N. Y.), 360. See, also, Beckett v. West of England Ins. Co., 25 L. T., N. S., 739; Hopper v. West Marine Ins. Co., 46 L. T., N. S., 107.

[166] Jones v. Neptune M. Ins. Co., L. R. 7 Q. B. 702; Gordon v. American Ins. Co., 4 Denio (N. Y.), 360.

[167] Gordon v. American Ins. Co., 4 Denio (N. Y.), 360; Beckett v. West of England Ins. Co., 25 L. T., N. S., 739.

[168] Jones v. Neptune M. Ins. Co., L. R. 7 Q. B. 702.

[169] Jones v. Neptune M. Ins. Co., L. R. 7 Q. B. 702.

down of the machinery until the final sailing of the vessel. These provisions were in writing. In a subsequent part of the policy, however, there was a provision that the insurance should commence "upon the freight and goods or merchandise on board from the loading of said goods or merchandise on board the said ship or vessel at Montevideo." This last clause was in print, with the exception of the word "Montevideo." At the time of effecting the insurance it was known to both the insurer and insured that though meat could be loaded at other ports in the River Plate, that it could not be loaded at Montevideo, in consequence of the absence of appliances at that port. The vessel arrived at Montevideo on her outward voyage, and thence proceeded to Boca, one of the ports named where a cargo of meat was ready for shipment. Here her refrigerating machinery broke down and rendered necessary the abandonment of the design as to loading the meat. It was held that the words used in the clause as to the commencement of the risk with regard to the loading of the goods, being inapplicable under the circumstances of the case, should be rejected, and that the policy attached, notwithstanding the fact that the meat had not been loaded on board the ship.[170]

§ 1609. Risk on Freight will Attach Only on Goods Laden where no Contract for the Goods Exists.—The risk on freight will only attach on goods actually laden where there is no contract to supply a cargo, and only a part cargo is provided, and this is true even though the policy be a valued one on freight, since a mere probability or reasonable expectation is not of itself sufficient to give an inchoate right to freight. The goods must either be actually shipped, or there must be an actual valid and binding contract therefor.[171] The

[170] Hydannes Steamship Co. v. Indemnity M. M. Assur. Co. (Eng. C. A. Q. B. D.), L. R. 1 Q. B. 500, reversing the decision of Willes, J.

[171] Patrick v. Eames, 3 Camp. 441; Devaux v. Jansen, 5 Bing. N. C. 539, per the court; Forbes v. Aspinall, 13 East, 323; Tobin v. Hartford, 13 Com. B., N. S., 791; Forbes v. Corbie, 1 Camp. 520; Flint v. Fleming, 1 Barn. & Adol. 45, per Tenterden, C. J., Bayley, J., and Parke, J. See Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346.

case of Riley v. Hartford Insurance Company[172] was a valued policy on ship, and an open one on freight laden or to be laden. The voyage was from New Orleans to Gibraltar, with liberty to go to Malaga and the Cape de Verds for salt, and back to the United States. Her cargo out was delivered and the freight earned, with the exception of about two thousand dollars, which was kept on board, and was used in purchasing a cargo at Gibraltar, which was laden on freight. The vessel proceeded thence for the Cape de Verds, intending to invest the two thousand dollars there in salt. No contract, however, was made therefor, but had the money been so invested, the freight thereon to the United States would have exceeded the two thousand dollars, and the vessel was competent to have carried sufficient salt to have earned said freight. The vessel never reached the Cape de Verds, being totally lost on the voyage by a peril insured against, and abandonment was made to the defendants. The claim of total loss of freight was resisted, and it was held that the insurers were liable for only the loss of freight of the goods actually on board. It will be observed that the principal factors in the case are: 1. The policy on the ship was valued; 2. The insurance was on freight of goods laden or to be laden under an open policy; 3. It was not a case of chartered freight; the freight was to have been derived from the transportation of merchandise by the shipowner; 4. Recovery was sought on the freight of a cargo expected to be laden; 5. No part of any such cargo was received on board, nor was it ready to be shipped; 6. No cargo had been procured or contracted for at the Cape de Verds, nor was there any title to any cargo there; 7. There was a cargo actually on board on freight when the ship was lost on her voyage to the Cape de Verds, but the freight thereon was less than two thousand dollars. The court[173] expressly and unequivocally declared that the freight must have once commenced to be earned before the policy could attach, and that the insurance could operate only on such freight as actually existed, by having a cargo on board the vessel, and could not

[172] 2 Com. 368.

[173] Id., per Swift, C. J., and Hosmer, J.

operate on a cargo expected to be laden; that in determining when the right to freight commenced, the case was to be distinguished from that of chartered freight for a round voyage; that the right commences in the case of freight when the goods are on board, or at furthest when a part have been received and the rest are ready to be shipped; that "it matters not whether the shipowner contemplates the purchase of goods at a port on which to procure a freight with money he has in possession or which is due to him at the place of destination, or on his personal credit. In either event, his right to freight cannot commence until he has shipped on board the contemplated cargo." The court relied upon Forbes v. Aspinall.[174] We would suggest that this case also involves the same principles which underlie the case of Tonge v. Watts.[175] A case was decided in Pennsylvania which, although the ship sailed under a charter-party, involved the principle that a mere expectation of earning freight, neither the cargo nor any portion thereof being purchased or even contracted for, is not sufficient; or in other words, that if the vessel sails for a port upon the mere contingency of obtaining a load there, a recovery will not lie.[176] The principle involved in these two cases does not controvert the rule that by contract there may be an interest created in freight before the goods are put on board, nor does it conflict with the law that in case of a charter-party of affreightment the right to freight commences as soon as the voyage is entered upon, and that if there is an entire freight for the performance of the whole voyage, the inchoate right to freight stipulated for commences as soon as the ship breaks ground, and this is so even though in such case of chartered freight there be numerous ports of destination;[177] but the cases do establish the principle which underlies all insurance law, that a mere expectation of itself, when not founded upon an actual right to the thing nor

[174] 13 East, 323.

[175] See sec. 1607, herein.

[176] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97.

[177] See Riley v. Hartford Ins. Co., 2 Conn. 368, per Hosmer, J.; Knox v. Wood, 1 Camp. 543.

upon a valid contract to it, or which is not coupled with an existing title to that out of which the expectancy arises, does not constitute an insurable interest.[178]

§ 1610. Risk on Freight Attaches under Valued Policy where Part Only of Goods are Laden.—Under a valued policy on freight the right to indemnity attaches if any part of the cargo is taken on board, where the balance of the goods to the amount of the rest of the freight are ready to be shipped, or are contracted for and are prevented from being laden by reason of a peril insured against.[179] Although Lord Kenyon, C. J., in Thompson v. Taylor,[180] bases the decision in Montgomery v. Eggington,[181] relied on in support of the above rule, upon the fact that there was an inception of the contract, because part of the goods were taken on board, nevertheless the rule does not rest alone upon such fact, but upon the principle that both ship and goods were so relatively situated, with reference to earning freight, as to create a well-grounded expectation that freight would be earned, which the intervention of a peril insured against prevented, and that a mere probability or reasonable expectation is not of itself sufficient.[182]

§ 1611. Risk on Freight under Valued Policy may Attach Only Proportionately to Goods and Freight Actually at Risk.—If the policy be valued on goods and freight, and through mistake or design only a part of the goods be put on board, there can be, in case of total loss, only such a pro-

[178] See sec. 897, herein.

[179] So held in Montgomery v. Eggington, 3 Term Rep. 362. See, also, Gordon v. American Ins. Co. of New York, 4 Denio (N. Y.) 362; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Forbes v. Aspinall, 13 East, 323; Tobin v. Hartford, 13 Com. B., N. S., 791; Mount v. Harrison, 4 Bing. 388; 1 Moore & P. 14; Parke v. Hebson, cited in 2 Bos. & P. 326; De Longuemere v. Phœnix Ins. Co., 10 Johns. (N. Y.) 128; Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97; De Longuemere v. New York F. Ins. Co., 10 Johns. (N. Y.) 202; Rhand v. Robb Faculty, Dec. 1801 to 1807, p. 433; Truscott v. Christie, 2 Brod. & B. 329. See sec. 1612, herein.

[180] 6 Term Rep. 482

[181] 3 Term Rep. 362.

[182] See cases under sec. 1606, and examine sec. 1612, herein.

portionate recovery as the goods and freight at risk bear to the whole valuation.[183] But the general rule is that in case of a valued policy on freight the valuation cannot be opened, where there is an inchoate right to some freight, and the valuation is bona fide.[184]

§ 1612. Risk Attaches on Freight if Cargo is Purchased or Contracted for and both Ship and Cargo are Ready.— It is now an established rule, settled by the courts and agreed upon by the text-writers on the subject, that the risk on freight will attach, although no goods are laden on board the ship, where the vessel is in a condition to receive the goods, and the latter are purchased or contracted for and ready to be shipped, and nothing prevents their being laden but the intervention of a peril insured against.[185] But a question has been raised by a learned writer whether such a rule is exclusive, or may be extended to cover freight on goods which are not fully ready to be shipped, although they are purchased or contracted for, and also whether so much of the rule is not too strict which restricts the relative situation of the ship and the goods to that point where nothing but the intervention of a peril insured against can prevent freight being earned.[186] The above rule will be enforced where the following facts exist in addition to the fact that the intervention of a peril insured against prevents the loading: 1. Where a cargo is purchased or contracted for and is ready to be laden, and the ship is in the proper place and ready to receive it;[187] 2. Where the policy is "at and

[183] Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Forbes v. Aspinall, 13 East, 323.

[184] Davy v. Hallett, 3 Caines (N. Y.), 16; Patapsco Ins. Co. v. Briscoe, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; Cole v. Louisiana Ins. Co., 14 Mart. (La.) 165; Coolidge v. Gloucester M. Ins. Co., 15 Mass. 341; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 143.

[185] See cases noted under the following sections, and Cal. Civ. Code, secs. 2662, 2663.

[186] 1 Parsons on Marine Insurance, ed. 1868, 171.

[187] Flint v. Flemyng, 1 Barn. & Adol. 45; 8 L. J. K. B. 350; Forbes v. Aspinall, 13 East, 323, per Lord Ellenborough; Gordon v. American Ins. Co., 4 Denio (N. Y.), 360, per the court; Devaux v. Janson, 5 Bing. N. C. 539, per Tindal, C. J.; Parke v. Hebson, cited in 2 Bos. & P. 326, 329; De Longuemere v. New York Mut. F. Ins. Co., 10 Johns. (N. Y.) 120; Truscott v. Christie, 2 Brod. & B. 320.

from," and the outward cargo is discharged, and the ship has purchased a part of her homeward cargo and contracted for the residue, or has either purchased or contracted for the homeward cargo, and both ship and cargo are ready at the place of loading;[188] 3. Where the cargo is purchased or contracted for, and is ready for shipping, but is at a distance from the place of loading, the ship being ready;[189] 4. Where the goods are purchased and in readiness to be shipped, but the vessel having been in the drydock for repairs, she is reported ready for sea, but the loss is sustained in getting her out of the dock;[190] 5. Where the vessel has not unloaded all her cargo at the outport, but has retained a part for ballast, the vessel being ready and the cargo being contracted for and ready;[191] 6. Where the ship engaged in a trading voyage is completing her loading from port to port, and has contracted for the residue of her cargo, and is on her voyage ready to load the same on arrival;[192] 7. Where the necessary conditions as to the ship and cargo being in readiness exist, and the contract for the loading rests only in parol.[193] But the ship will not be held to be in condition to receive the goods, even though they are purchased or contracted for and in readiness for being laden, if the ship has not discharged the bulk of her outward cargo, and cannot therefore ship the homeward cargo.[194] It will be observed that in the cases above noted in support of the rule stated at the beginning of this section, the cargo was in readiness to be shipped, in the sense that it was either purchased or contracted for, and in such case the rule seems to

[188] Flint v. Flemyng, 1 Barn. & Adol. 45; 8 L. J. K. B. 350; Williamson v. Innes, 1 M. & R. 88; 8 Bing. 80, n.; Patapsco Ins Co. v. Briscoe, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; De Vaux v. Janson, 8 L. J. Com. P., N. S., 284; 5 Bing. N. C. 519.

[189] De Vaux v. Janson, 8 L. J. Com. P., N. S., 284; 5 Bing. N. C. 519.

[190] De Vaux v. Janson, 8 L. J. Com. P., N. S., 284; 5 Bing. N. C. 519.

[191] Williamson v. Innes, 1 M. & R. 88; 8 Bing. 80, n.

[192] Parke v. Hebson, 2 Brod. & B. 326, n. See Warre v. Miller, 4 Barn. & C. 538; 1 Car. & P. 237; 4 L. J. K. B. S.

[193] Patrick v. Eames, 3 Camp. 441, per Lord Ellenborough; Parke v. Hebson, 2 Brod. & B. 326, n.; Flint v. Flemyng, 1 Barn. & Adol. 45.

[194] Forbes v. Aspinall, 13 East, 323.

exclude, by the decided cases, any other proposition than the one that the goods and ship must be so relatively situated as to create a well-grounded expectation of freight being realized.[195] And it would seem that by a cargo being ready to be laden is meant not that the goods must be actually and necessarily upon the quay or wharf, but that they may be at a comparatively distant place, in an actual state of readiness under an existing valid contract which contemplates their being laden, and in all cases reference must be had to usage and the nature of the risk and the character of the voyage.[196]

§ 1613. Risk on Freight will not Attach where Loss is Incurred in a Voyage Other than that Insured.—If freight is insured on a specified voyage, and the vessel agrees for freight for another and different voyage than the one insured, and undertakes said voyage and sustains damage thereon which prevents her from earning freight on the voyage insured, the risk does not attach so as to make the insurers liable.[197] If the policy insures freight for a particular voyage by a named vesel, and the goods are laden and the voyage commenced, the risk attaches upon and covers the freight of that cargo in that vessel and for that voyage,[198] but the risk may attach upon and cover freight of goods taken at an intermediate port, under a policy on freight "from" a specified

[195] Curling v. Long, 1 Bos. & P. 636, per Eyre, C. J.; M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J. Examine Triscott v. Christie, 2 Barn. & Adol. 320; 1 Phillips on Insurance 3d ed., 185, sec. 330, and criticisms thereof in 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 443, 434, and note 1; and also in Parsons' Marine Insurance, ed. 1868, 171. And see Barber v. Fleming, 5 Q. B. 59, per Blackburn, J., which, however, was a case of chartered freight.

[196] See Devaux v. Janson, 5 Bing. N. C. 539, per Tindall, C. J., and cases cited above under this section. In this sense the words of Mr. Parsons will be applicable where he says of the goods: "If they are in port but need that something be done to them before they are in a condition to go on board, we should say that the ship still has an insurable interest in the freight of them, although in one sense they cannot be said to be ready to go on board": 1 Parsons on Marine Insurance, ed. 1868, 169.

[197] Sellar v. McVickar, 4 Bos. & P. 23.

[198] M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J.

port, with liberty to call and take goods.[199] And in a case already noted the risk on freight was held to have attached where an intermediate voyage was made through necessity, which effected a postponement of the risk.[200]

§ **1614. Risk on Freight "at and from"—Homeward Voyage.**—Freight for the return cargo may be covered by the words "at and from," [201] and such words exclude the freight on the outward cargo "to" the same port, although the former policy be expressed as in continuation of the latter.[202] It will be noted from the character of the cases considered under the section preceding the last that the rule there stated governs in cases of insurance "at and from" a foreign port, so far as the facts may warrant, and, as a general rule, such insurances are governed by the general principles stated herein under the preceding sections relating to freight. And the risk will attach when the homeward cargo is laden or partly laden or contracted for or purchased, and both ship and cargo are ready.[203]

§ **1615. Valued Policy on Freight Outward and Homeward Covers Each Voyage.**—If the policy be on freight outward and homeward on a particular voyage, the outward risk will terminate upon the cargo outward being discharged and safely landed and the freight earned, and the homeward risk will attach when the goods are laden or purchased or contracted for, and in readiness to be shipped, the ship being in a condition to receive them. But the valuation covers each voyage, and precludes the insurer, in case of loss of the home-

[199] Barclay v. Sterling, 5 Maule & S. 6. "In principle and good sense there can be no reason why this policy which was intended to cover the freight upon the whole voyage should not attach upon the freight of goods loaded at an intermediate port in the voyage. . . . . It would be unjust to hold otherwise," per Bayley, J.

[200] Driscoll v. Passmore, 1 Bos. & P. 200.

[201] Bell v. Bell, 2 Camp. 475.

[202] Bell v. Bell, 2 Camp. 475.

[203] See, also, Patapsco Ins. Co. v. Briscoe, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219.

ward freight by a peril insured against, from any claim to credit for freight earned on the outward voyage.[204]

§ 1616. Freight where Voyage Consists of Distinct or Successive Passages—Valued Policy.—Freight "at and from" B. to R. and back to M., or home, is not a policy for one entire voyage, but for successive voyages, and the risk attaches upon and covers freight of the goods for each passage. The same principle governs in all cases where the voyage is not entire and consists of successive passages, or where the insurance on freight is for a specified period. With regard to the valuation of freight in such cases, the better rule seems to be that the valuation applies to the successively pending voyages. This presumption is, however, subject to rebuttal by the express terms of the policy, or by other proper proof that the valuation covers successive freights in the aggregate.[205]

§ 1617. Risk Terminates where Freight is Earned—Freight Partly Earned.—The risk upon freight terminates at that point where the freight has been wholly earned, or in case a part thereof has been earned, then it ceases as to such part. If the whole freight insured has been earned, the insurer can have no further risk or interest concerning it by abandonment or otherwise.[206] If the goods are carried to the place of destination and accepted by the consignee, the freight is earned, although the goods are not permitted to be landed by the government of the country at the port of destination, and they are brought back on the return voyage, and in such case the insured cannot recover.[207] And where the goods are

[204] Davy v. Hallett, 3 Caines (N. Y.), 16; Patapsco Ins. Co. v. Briscoe, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; Insurance Co. v. Mordecai, 22 How. (U. S.) 111; Thriving v. Washington Ins. Co., 10 Gray (Mass.), 443.

[205] Hugg v. Augusta Ins. Co., 7 How. (U. S.) 595. See Patapsco Ins. Co. v. Briscoe, 7 Gill & J. (Md.) 293; Hughes v. Union Ins. Co., 8 Wheat. (U. S.) 294; Locke v. Swan, 13 Mass. 76; Pennoyer v. Hallett, 15 Johns. (N. Y.) 332; Smith v. Wilson, 8 East, 437; Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97.

[206] Patapsco Ins. Co. v. Briscoe, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; Mayo v. Maine F. & M. Ins. Co., 4 Mass. 374.

[207] Morgan v. Insurance Co. of North America, 4 Dall. (C. C.) 455. This decision was based upon the Ordonnance of Louis XIV.

voluntarily accepted by the owner at a port short of the ship's destination, into which the vessel has put as a port of necessity, being unable to complete her voyage, freight pro rata itineris must be deducted in behalf of the underwriters; that is, freight must be paid according to the proportion of the voyage performed, and this is a partial loss of freight. But this is not so if the cargo be not voluntarily accepted at such other port.[208] If the cargo is carried to the port of destination and the freight earned, the contract is terminated and there is no loss of freight, even though the ship may be rightfully abandoned.[209] And though the vessel be prevented from loading, owing to her detention by the government of the place and consequent detention by weather, yet if she earns freight on her return voyage the insurers are discharged, although the detention caused an expense exceeding the freight earned.[210] Nor does the insurer ordinarily contract that freight shall be earned within any specified period. If the freight is earned, this terminates the insurance, so that a policy on freight does not in such case include loss by detention of the ship by sea perils.[211] Where a right exists in the shipowners, in case the ship is damaged, to keep the cargo a reasonable time, repair the vessel, and make her seasonably ready to prosecute the voyage and earn freight, and repairs are not prevented by the perils of the sea, and can be made at an expense which a prudent owner uninsured would have incurred, and they lose their freight, not by any peril insured against, but by a voluntary relinquishment of that right, and they have no claim upon the cargo owners for freight earned,

[208] Williams v. Smith, 2 Caines (N. Y.), 13, 21; Merchants' Mut. Ins. Co. v. Butler, 20 Md. 41; The Joseph Farrell, 31 Fed. Rep. 844; Propeller Mohawk, 8 Wall. (U. S.) 153; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Teasdale v. Charleston Ins. Co., 2 Brev. (S. C.) 190; 3 Am. Dec. 705; Hurtin v. Union Ins. Co., 1 Wash. (C. C.) 530; Atlantic Mut. Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358. See, also, Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 323; Post v. Robertson, 1 Johns. (N. Y.) 24; McKibbin v. Peck, 39 N. Y. 262.

[209] Fiedler v. New York Ins. Co., 6 Duer (N. Y.), 282; Scottish M. Ins. Co. v. Turner, 4 H. L. Cas. 311.

[210] Everth v. Smith, 2 Maule & S. 278.

[211] Mayo v. Maine F. & M. Ins. Co., 4 Mass. 174.

the insurers of freight are discharged.[212] And this is so even though the cargo be damaged,[213] for a voluntary surrender of the cargo free of freight prematurely made so far terminates the insurance on freight, as to preclude a recovery of freight money.[214] So the risk on freight may be terminated by the master losing the freight, by unwarrantably giving up the voyage and delivering the cargo to the shipper at an intermediate port.[215] But the safe delivery of the cargo at the port of destination does not necessarily relieve the insurer of freight, since the vessel may be wholly lost by a peril insured against and the power to earn freight be thereby lost, and the rule applies equally to cases of constructive as of actual total loss, since the owner's right to abandon in the former case and his inability to receive freight must have been a risk contemplated by the insurers.[216] But if no freight is earned and the vessel becomes a total loss, and there is no opportunity to transship the goods, the insurers are liable.[217] And if the vessel is unable to take her cargo owing to delay for repairs, and it is sent by another ship, and full freight is afterward earned

[212] Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; 3 Johns. (N. Y.) 321; Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437; reversing 46 Barb. (N. Y.) 642; Phillipot v. Swan, 11 Com. B., N. S., 270; 30 L. J. Com. P. 358; Herbet v. Hallett, 3 Johns. Cas. (N. Y.) 93; Moss v. Smith, 9 Com. B. 44; 19 L. J. Com. P., N. S., 225; Clark v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 104; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405. See Jordan v. Warren Ins. Co., 1 Story (C. C.), 342.

[213] McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437; reversing 46 Barb. (N. Y.) 642; Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109.

[214] Allen v. Mutual Ins. Co., 44 N. Y. 437; 4 Am. Rep. 700; Hubbell v. Great Western Ins. Co., 74 N. Y. 246.

[215] Clark v. Massachusetts Ins. Co., 2 Pick. (Mass.) 104; 13 Am. Dec. 400.

[216] This was so held in a case where the policy was on freight valued, and the vessel became constructively a total loss, the cargo being transshipped for the freight that would have been earned and arriving safely at its destination: Thriving v. Washington Ins. Co., 10 Gray (Mass.), 443. See, also, Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595. Examine Griswold v. New York Ins. Co., 1 Johns. (N. Y.) 205; Coolidge v. Gloucester Ins. Co., 15 Mass. 341.

[217] Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50.

by her in carrying other goods, there is no recovery for a partial loss of freight.[218] And the underwriters are not liable under a policy on freight where the vessel is disabled at sea, although there is not a constructive total loss and the cargo has been actually delivered.[219] In case, however, of a constructive total loss, the general rule is that it is incumbent upon the master to earn freight by forwarding the cargo by another ship, except no other vessel may be obtained for that purpose. Otherwise the insurers are not liable, and the master is not bound to seek another vessel to forward the cargo, unless one can be found at the port of distress or a contiguous one.[220] But regard must be had to the freight to be paid for forwarding goods on another ship, and unless the ship may be procured at an expense not exceeding the freight that would have been earned had the voyage been completed, the master cannot be required by the insurers on freight to procure another ship for forwarding the goods.[221] But in case of a valid policy, if there is no opportunity to forward the goods to their destination and no freight is earned, the insurers are liable for the whole loss.[222]

§ **1618. Risk on Freight Terminated by Assured Accepting Goods at Intermediate Port.**—If the assured accepts his goods at an intermediate port, paying full freight, this terminates the risk on freight, even though the goods are there accepted on account of blockade of the port of destination, and are transshipped, nor in such case can the insured recover the expenses incurred by transshipment, employment of lighters, or of insurance on the lighters.[223]

§ **1619. Risk on Freight against Total Loss Only not Terminated by Delivery of Some Goods at Intermediate Port.**—The fact that some freight has been earned prior

[218] Brocklebank v. Lugrue, 1 Moody & R. 102; 1 Barn. & Adol. 81.

[219] Fiedler v. New York Ins. Co., 6 Duer (N. Y.), 282.

[220] Kinsman v. New York etc. Ins. Co., 5 Bosw. (N. Y.) 460; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107.

[221] Hugg v. Augusta Ins. etc. Co., 7 How. (U. S.) 595; Willard v. Millers' etc. Ins. Co., 24 Mo. 561.

[222] Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50.

[223] Low v. Davy, 5 Binn. (Pa.) 595.

to the loss by the delivery of goods at intermediate ports does not terminate the risk on freight against a total loss only, so far as to preclude a recovery of freight pending at the time of the loss.[224]

§ **1620. Termination of Risk on Freight to a Port or Ports of Discharge.**—A policy of insurance upon freight to a port of discharge in a certain country will terminate at the first port there where the cargo is discharged.[225] But if the port of discharge is limited to a given locality by the description of the voyage, then the liberty of a port must be confined to that locality; as in case the voyage is to a port on the north side of Cuba, with the liberty of a second port therein, this will be construed to mean that the second port must be on the north side of the island.[226]

§ **1621. General Rule as to Attachment of Risk on Chartered Freight.**—We have already noted the distinction between freight and chartered freight,[227] and a different rule applies in the latter case, as to the attachment of the risk, than in the former. It may be stated as a general rule that the risk on chartered freight attaches when the ship has broken ground for the voyage upon which she would have earned freight under the charter-party except for the intervention of peril insured against, and the fact that there are no goods aboard is immaterial.[228]

§ **1622. Extension of the Rule Last Stated.**—The rule stated under the preceding section has been extended in nu-

[224] Willard v. Millers' etc. Ins. Co., 30 Mo. (9 Jones) 35.

[225] Fay v. Alliance Ins. Co., 16 Gray (82 Mass.), 465.

[226] Nicholson v. Mercantile etc. Ins. Co., 106 Mass. 399.

[227] Section 1606, herein.

[228] Davidson v. Willasey, 1 Maule & S. 312, per Lawrence, J.; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; Thompson v. Taylor, 6 Term Rep. 478, noted under sec. 1607, herein; McGaw v. Ocean Ins. Co., 23 Pick (Mass.) 409, per Shaw, C. J.; Horncastle v. Suart, 7 East, 400; Moses v. Pratt, 4 Camp. 297; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; Truscott v. Christie, 2 Ball & B. 320; Hobbs v. Hammun, 3 Camp. 93; Ellis v. Lafine, 8 Ex. 546; Cal. Civ. Code, secs, 2662, 2663; N. Y. Civ. Code, §§ 1450-51.

merous cases beyond the point of breaking ground on the port of loading. Thus, if the insured has begun to perform his part of the contract, so that there is such an inception thereof that his right to earn freight is only prevented by the introduction of a peril insured against, the right to freight has accrued.[229] And it is said that if a shipowner, having a contract with another person by which he may earn freight, has "taken steps and incurred expense upon the voyage toward earning it," this constitutes an inchoate interest, which if afterward destroyed by a peril insured against entitles him to indemnity for the loss.[230] We cannot believe, however, that the court intended by this statement to formulate a rule not embodied within the principle first stated under this section. Again, the risk will attach where the vessel is being fitted at the place of loading to receive and carry goods contracted for. So also where the vessel is loaded, but has not sailed; or if she has set sail for the place of loading; or if there be an express contract for a load, though none is taken; or if the vessel sails under a contract; or being in port an express contract is made to load her, and she is fitted to take in such a load, the risk will attach.[231] But in cases of chartered freight generally, as well as in cases of freight outward and homeward, wherein the question may arise whether the voyage is entire, reference must be had, as to the inception of the risk, to the terms of the charter-party or contract of affreightment, as well as to the description of the voyage insured, since there can be no inception of a right to freight on the voyage insured where the voyage undertaken is another or different one from that contemplated by the parties.[232]

[229] Thompson v. Taylor, 6 Term Rep. 478, per Lord Kenyon, C. J.

[230] In this case the vessel had sailed in ballast for the port from which the voyage was to commence, but she stopped at an intermediate port for supplies, and was there lost, and the assured was held entitled to recover: Barber v. Flemyng, L. R. 5 Q. B. 59, per Blackburn, J.; s. c., 39 L. J. Q. B. 25; 18 Week. Rep. 254.

[231] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.), 97, per Huston, J. See, also, Davidson v. Willasey, 1 Maule & S., per Laurence, J.; Gordon v. American Ins. Co., 4 Denio (N. Y.) 362, per Bronson, C. J.

[232] Sellar v. McVicar, 1 Bos. & P. N. R. 23. See Meech v. Philadelphia Ins. Co., 3 Whart. (Pa.) 473, and Livingston v. Columbian Ins. Co., 3 Johns. (N. Y.) 49, as to voyage being entire.

§ 1623. Attachment of Risk where Vessel is being Fitted at Place of Loading to Receive Contracted-for Cargo. If the ship under a contract of affreightment is at the port of loading, and has under an agreement therefor commenced to fit the ship to carry a cargo contracted for, and before she is fully refitted for the specified purpose is lost by a peril insured against, the risk attaches upon the freight which the ship would in all probability have earned had the loss not occurred.[233]

§ 1624. Risk on Chartered Freight Attaches by Inception of Voyage even in Ballast to Port of Loading.— If the voyage has commenced under which, pursuant to the terms of the charter-party, freight is to be earned, the inchoate right to freight has accrued, and within this principle is the well-settled rule that there may be an inception of the voyage on which freight is to be earned by the inception of a voyage from one port to another for the purpose of there taking in cargo pursuant to the terms of the charter-party, even though the vessel sails in ballast, and the fact that no goods are ever laden, or that the ship never arrives at said port of lading, is immaterial where the same is prevented by a peril insured against. This rule, however, implies that the voyage to the port of loading is for the object and purposes of the charter-party, within the terms thereof, and that the ship has broken ground on a voyage for that purpose.[234] And it is held that the rule obtains even though the insurers did not know that the vessel was under a charter-party, and had made no inquiries as to the fact.[235]

[233] Truscott v. Christie, 2 B. & B. 320; 5 Moore, 33.

[234] Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 143, per Shaw, C. J.; Atty v. Lindo, 1 Bos. & P. N. R. 236; Thompson v. Taylor, 6 Term Rep. 478; Foley v. United F. & M. Ins. Co., 5 L. R. Com. P. 155; 33 L. J. Com. P. 206; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; Barber v. Flemyng, L. R. 5 Q. B. 59; 39 L. J. Q. B. 25; 18 Week. Rep. 254; Warre v. Miller, 4 Barn. & C. 538; Hodgson v. Mississippi Ins. Co., 2 La. (O. S.) 341; Potter v. Rankin, L. R. 6 H. L. 83, 151; Horncastle v. Suart, 7 East, 399; Jackson v. Union Mut. Ins. Co., 10 L. R. Com. P., 125; 8 L. R. Com. P. 572; Hart v. Delaware Ins. Co., 2 Wash (C. C.) 346; Gordon v. American Ins. Co., 4 Denio (N. Y.), 362, per Bronson, C. J.

[235] Hodgson v. Mississippi Ins. Co., 2 La. (O. S.) 341. See Thompson v. Taylor, 6 Term Rep. 478.

§ 1625. Contract Stipulation may Supersede the above Rule.—The contract may stipulate when the risk shall commence on chartered freight, in which case the stipulation will supersede the rule stated under the last section, and the risk will commence only as specified under the contract.[236]

§ 1626. Where there is a Second Charter-party at and from Outport.—An inchoate right to chartered freight may accrue under a second charter-party, the risk being "at and from" the outport of the first, by the ship's sailing on her outward voyage, in pursuance of the charter-party, to said outport, for the purpose of there discharging her outward cargo, and of then taking on the cargo to earn freight under the second charter-party. Thus, where a ship was loaded and about to sail from C. to M., and was chartered to proceed to M. and there discharge, and a policy was effected on chartered freight at and from M., where she was chartered to take a cargo of rice, and she arrived at M. and was lost while discharging, it was held that the policy attached upon arrival at M.[237] The case was, however, decided upon the authority of Thompson v. Taylor[238] and Barber v. Flemyng,[239] under which decisions an inchoate right to freight would have accrued from the inception of the voyage from C.

§ 1627. Outward and Homeward Freight—Where Contract or Freight is Entire.—In the case of outward and homeward chartered freight, if the contract for freight is entire by the terms of the charter-party, an inchoate right to the homeward freight will commence upon the inception of the voyage to the outport, notwithstanding the fact that the whole outward cargo is not discharged and no part of the homeward cargo is loaded. Thus, where a ship was chartered from L. to D. and back to L. at certain freight for the outward and

[236] Jones v. Neptune M. Ins. Co., 7 L. R. Q. B. 702; 41 L. J. Q. B. 370; 27 L. T., N. S., 308. See, 1608, herein.

[237] Foley v. United F. & M. Ins. Co., 5 L. R. Com. P. 155; 33 L. J. Com. P. 206; 18 Week. Rep. 437. See next section.

[238] 6 Term Rep. 478.

[239] 5 L. R. Q. B. 59.

homeward cargo, and a policy was effected on the freight of the ship at and from D. to L., and the ship having arrived at D. was captured before she had discharged her outward cargo or taken on any part of her homeward cargo, it was held by Lord Ellenborough that the risk on the homeward freight was incepted by the ship's departure from L.[240] So where the policy was a valued one at and from Philadelphia to Tampico, thence to Laguna and at and from thence to New York, and under the charter-party the charterer agreed to pay for her hire part at the port of discharge on delivery of the cargo and the balance on her return to New York, the contract was held entire for one sum out and home, and the assured was entitled to recover, though the vessel was lost in the outward voyage.[241] So the risk was held to attach on the whole freight, which was the sum for which the vessel was chartered, where said sum was entire for a voyage from A to B, and at and from thence to C, and the vessel, on arrival at B, was detained by an embargo and the insured abandoned.[242]

[240] Horncastle v. Suart, 7 East, 399. See Scott v. Libby, 1 Johns. (N. Y.) 336; 3 Am. Dec. 431; Hamilton v. Warfield, 2 Gill & J. (Md.) 482; Coffin v. Storer, 5 Mass. 252; 4 Am. Dec. 54; Blanchard v. Bucknam, 3 Greenl. 1; Smith v. Wilson, 8 East, 437; Mackrell v. Simond, 2 Chit. 666; Burrill v. Cleeman, 17 Johns. (N. Y.) 72.

[241] Meech v. Philadelphia Ins. Co., 3 Whart. (Pa.) 473.

[242] Livingston v. Columbian Ins. Co., 3 Johns. (N. Y.) 49. See, also, Ellis v. Lafone, 8 Ex. 546; 2 L. J. Ex. 124. But see secs. 1615, and 1616, herein.

CHAPTER XXXIX.

RESCISSION AND CANCELLATION.

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§ 1634. Rescission and Cancellation Generally.—Fire policies usually contain provisions relating to their rescission or cancellation by either party dependent upon certain conditions. In life policies depending upon the payment of premiums at specified times it is within the power of the assured to refuse or neglect payment on the day stipulated, and thereby abrogate the contract, so that the very nature of this class of contracts implies a right of the assured to annul the same, and the same rule applies, with certain exceptions, to certificates or contracts in mutual benefit societies; so a breach of contract by either party may, on general principles, afford a ground for rescission or cancellation. In mutual benefit societies not only the certificate, but the charter or articles of association and by-laws, must govern as to the mode of terminating the contract relations between the society and its

members. Inasmuch, however, as the relations of the parties to a contract of insurance are destroyed by rescission or cancellation, the act must be that of both parties, insured and insurer, subject to such exceptions as may arise from the nature of the contract itself, and it may be generally stated that the right to rescind, abandon, or cancel a contract of insurance must arise either by virtue of some statute, from the terms of the contract itself, or under a power reserved therein, or by mutual consent of the parties thereto. If, however, the policy has been obtained under certain circumstances of fraud, misrepresentation, or mistake, a court of equity may order a cancellation; it may also rescind on a proper showing. It is necessary in cases of rescission or cancellation by agreement that there be a complete contract or meeting of minds, otherwise the agreement will not stand.[1]

§ 1635. Statutory Provisions relating to Rescission or Cancellation.—Under the statutes of many of the states the assured or his legal representatives are entitled, upon making request therefor, to a cancellation of the policy in companies, associations, or corporations transacting the business of fire insurance, and also to a certain proportionate return of the premium.[2] The effect of such a statute is, that once the request of the assured is made it operates as a cancellation, in so far that a further continuance thereafter would

[1] See McAllister v. New England L. Ins. Co., 101 Mass. 558; Bennett v. City Ins. Co., 115 Mass. 241; Barker v. Walters, 8 Beav. 92; Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433; Thornton v. Knight, 16 Sim. 509; Massasoit Mills v. Western Assur. Co., 125 Mass. 110; Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. (N. Y.) 91; Fabyan v. Union Mut. F. Ins. C., 33 N. H. 203; Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatchf. (C. C.) 142. See chapter on premiums and assessments as to the principles governing life policies and certificates. As to right to rescind for default of other party, see note 30, L. R. Annot. 69.

[2] See Deering's Annot. Civ. Code Cal., sec. 2617, et seq.; 1 Mills' Stats. Colo. 1891, sec. 2234; Gen. Stats. Conn. 1888, sec. 2852; Comp. L. Dak. 1887, secs. 3103, 3104; McClain's Annot. Code Iowa. 1888, sec. 1724; Morrow v. Des Moines Ins. Co., 84 Iowa, 256, 260; 51 N. W. Rep. 3; 1 Gen. Stats. Kan. 1889, sec. 3435; Pub. Acts Mich. 1887, c. 305, sec. 17; Comp. Stats. Neb. 1889, c. 43, sec. 42; New York Gen. Laws, 1892, c. 38, art. 3, sec. 122; Hamilton's Stat. Rev. of Ins. L. of

be in contravention of the statute.[3] But if the code specifies the grounds of cancellation, the insured cannot surrender his policy and claim a return of a ratable proportion of the premium under a statute so providing, unless the policy is canceled for a reason specified in the code, or unless the same be done under a right reserved in the policy itself.[4] Other states also provide by statute that no company shall cancel fire poli-

N. Y. 1892, p. 60, sec. 122; 3 Rev. Stats. 8th ed., p. 1661, c. 110, sec. 3. Laws 1886, c. 612, provides for cancellation of fire policies upon request of insured or his legal representatives, and return of amount of premiums paid, less customary short rate premium for expired time of full term for which policy issued or renewed, notwithstanding contrary stipulation in policy, and permitting domestic corporation to cancel policies upon risks in other states upon the same terms as provided by the laws of such other state: 1 Rev. Stats. Ohio, 1890, sec. 3664, et seq.; Stats. Oklahoma, 1890, sec, 3112; 1 Sanb. & B. Annot. Stats. Wis. 1889, sec. 1946. See Gen. Laws Minn. 1876, c. 86, entitled, "An act regulating the cancellation of fire insurance policies," authorizing the commissioners to make examination as to doings, etc., of company, and to examine form of policy of foreign company, and to refuse to admit it to transact business in state, "or to renew the annual authority of any company previously admitted, whenever the form of policy contract issued or proposed to be issued does not permit the cancellation of the same at the request of the insured on equitable terms." Laws Minn. 1895, p. 392, c. 175, entitled, "An act to revise and codify the insurance laws of the state," provides (Id., p. 445, sec. 116), that "all acts and parts of acts inconsistent herewith are hereby repealed," said law taking effect Oct. 1, 1895, at noon. Section 5, Id., p. 394, of the same act provides that "the commissioner shall exercise the powers and perform the duties conferred and imposed upon him by this act, or by any other law of the state." A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance: 2 Montana Codes (Civ. Code) Annot. 1895, sec. 3421. In Pennsylvania, under an act relating to boiler insurance, "If for any cause such insurance company shall cancel a policy of insurance issued in accordance with the provisions of this act, or shall so modify the same that the premium shall be less than the amount hereinbefore provided for, such cancellation or modification shall render the certificate of inspection previously given invalid, and notice of such cancellation shall be communicated to the city inspector immediately": Pub. Laws, 1891, 5, sec. 2; 1 Pepper & Lewis' Dig. 1700-1894, p. 2388, sec. 107.

[3] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608; 40 N. Y. St. Rep. 426; 28 N. E. Rep. 653; 21 Ins. L. J. 31.

[4] Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co., 99 Cal. 421; 24 Pac. Rep. 1018.

cies without a special notice and return of a specified proportionate premium.[5] If statutory notice is a condition precedent to cancellation, the day of mailing is to be excluded in the computation of time.[6]

§ 1636. Rescission or Cancellation before Contract Delivered or Finally Completed.—If a binding slip is given the applicant for a policy binding the company for insurance upon the property intended to be covered until the policy is delivered, such binding receipt is only a conditional contract, and the company's right to cancel such slip is the same as if it contained the same conditions usually found in the company's ordinary policies, and the company is not compelled to wait until the policy is issued before exercising the right to cancel.[7] If the application provides that the company shall have authority to determine whether a policy shall issue or not, the company may cancel a policy issued but not actually delivered, although it is sent to the company's agent for delivery, and although a receipt that the contract shall be binding until the policy is received is given the applicant by the agent.[8] But the policy must be actually canceled if delivered, and if a right is given in the application executed after such delivery whereby the contract is not to go into effect until approved by the company or its general agent, the mere fact that the local agent is notified to cancel does not of itself operate as a cancellation, and said agent neglecting to cancel before loss, the policy will be upheld.[9]

§ 1637. Rescission or Cancellation by Consent.—There is no doubt of the right of the parties to a contract of insur-

[5] Gen. Stats. Conn. 1888, sec. 2852; Comp. L. Dak. 1887, sec. 3104; 1 Gen. Stats. Kan. 1889, sec. 3435; Pub. Acts Mich. 1887, c. 305, sec. 17.

[6] Hicks v. National L. Ins. Co., 9 U. S. C. C. A. 215; 60 Fed. Rep. 690.

[7] Karelson v. Sun Fire Office, 122 N. Y. 545; 25 N. E. Rep. 921; Lipman v. Niagara F. Ins. Co., 121 N. Y. 454.

[8] Cotton States L. Ins. Co. v. Scurry, 50 Ga. 48; Goodfellow v. Times & Beacon Assur. Co., 17 U. C. Q. B. 411. But see Kennedy v. New York L. Ins. Co., 10 La. Ann. 809.

[9] Insurance Co. v. Webster, 6 Wall. (U. S.) 129; Franklin Ins. Co. v. Massey, 23 Pa. St. 221.

ance to cancel the same by mutual consent, where the rights of third parties are not injured thereby. Such an agreement to annul the policy may be validly entered into by the parties, but all the conditions of such agreement must be observed, and observed in their entirety, unless the performance of some of them be waived. Such agreement to cancel may be embodied in the policy in the nature of a reservation, or it may be an extrinsic agreement made subsequently to the execution of the policy, and totally independent therefrom, or it may be in the nature of a compromise agreement. The question, however, more generally turns upon the point whether the cancellation is in conformity with the terms of the contract, or whether certain acts or statements amount to an agreement to cancel, and if so, whether the cancellation has been effected. These general principles are well settled. Thus, the contract may be canceled by a compromise agreement,[10] and if the parties all mutually agree and understand that the policy is to be canceled, it is not necessary to formally surrender the policy or tender the unearned premium.[11] The agreement to cancel the contract means an abrogation of the rights of both parties under the contract, and not that the obligations of one shall stand and that of the other be released.[12] But the agreement must be executed. An unexecuted parol agreement to cancel and surrender the premium note is no defense to an action on the note.[13]

§ 1638. Agreement to Cancel Marine Risk need not be in Writing.—If by custom or statute a contract is required to be in writing,[14] such fact might perhaps afford a basis upon which to predicate the rule that the cancellation thereof should be in writing, upon the theory that the release must be of as high a nature as the contract itself; but where a steamboat is insured while running between certain points, and

[10] King v. Ætna Ins. Co., 36 Mo. App. 128, 142.
[11] Hillock v. Traders' Ins. Co., 54 Mich. 531.
[12] Merchants' Mut. Ins. Co. v. Underwood, 1 Sand. (N. Y.) 474
[13] Columbia Ins. Co. v. Stone, 3 Allen (Mass.), 385.
[14] See Davies v. National F. & M. Ins. Co. of New Zealand, (H. L. C. App. Eng. 1891), L. R. App. C. 485. See sec. 35, herein.

the risk is extended upon payment of an additional premium, the cancellation of such agreement for extension need not be in writing.[15]

§ **1639. Option Reserved by Company to Cancel.**—If it is optional with the company to cancel a policy, under a right reserved in the policy, such option is not exercised by a request for the return of the policy for cancellation,[16] nor is a mere notice of a desire or intention to cancel sufficient.[17] The right to cancel may be reserved in such broad terms as to make it entirely optional with the company as to the time when and for what reason it will terminate the contract, and exclude the right to inquire into the motive and sufficiency of the cause. This was so held in a case where specific reasons were assigned as a basis for cancellation, and in addition thereto the policy reserved the right to cancel for any other cause the company should elect, after notice being given and upon refunding a ratable proportion of the premium.[18]

§ **1640. Cancellation for Nonpayment of Premiums or Other Breach of Condition.**—If the policy is canceled for the nonpayment of premiums, the insurer is entitled to recover the premiums earned while the risk was carried.[19] But in case of assessments, the right to cancel for nonpayment thereof depends upon the legality of the assessment, for the assured cannot be obligated to pay an assessment illegally levied, and his nonpayment of such an assessment gives no right to cancel.[20]

§ **1641. Cancellation where Policy is Assigned.**—If the policy is assigned as security to another, the consent of the assured is necessary to a cancellation by the company.[21] But a question may arise whether an action can be maintained on

[15] King v. Enterprise Ins. Co., 45 Ind. 43.

[16] Griffey v. New York Cent. Ins. Co., 100 N. Y. 417.

[17] Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189; Ætna Ins. Co. v. McGuire, 51 Ill. 343.

[18] International L. Ins. Co. v. Franklin F. Ins. Co., 66 N. Y. 119.

[19] Hibernian Ins. Co. v. Blanks, 35 La. Ann. 1175.

[20] Matter of People's Mut. Equitable F. Ins. Co., 9 Allen (Mass.), 319.

[21] Van Loan v. Farmers' Mut. F. Ins. Co., 90 N. Y., 280.

the policy by the vendee, or whether the same has been canceled by the assured under the terms of the policy before the loss has occurred, so as to preclude a recovery by the vendee. Thus, where a cargo was insured at and from G, to E., and at and from thence to port or ports in the United Kingdom, with privilege to claim a return of a proportionate premium if the risk should terminate at E. and the cargo was sold before arrival at E., the policy being transferred to the vendee, who brought suit thereupon to recover indemnity for a loss sustained after the ship reached E., it was held that the action could not be maintained by the vendee, as the vendor had claimed the stipulated return of premium for termination of the risk at E., and it also appeared in evidence that the cargo was sold free on board at G., including freight and insurance to E.[22]

§ **1642. Effect as to Cancellation of Repeal of Charter.**—If a company organized under the statute forfeits its charter by reason of a failure to comply with the provisions of a subsequently enacted repealing statute within the period therein limited, policies of the company outstanding at the time of the later act are not thereby canceled.[23]

§ **1643. Cancellation by Authority of Directors of Mutual Company.**—If the charter, articles of association, or by-laws passed in conformity therewith empower the directors of a mutual company to cancel or annul the policy at their option, such grant of power is in effect a reservation under the contract of the right to cancel, and the directors may lawfully exercise the power granted within the limits of the grant.[24] And where the by-law provides that the directors may cancel after notice, and if such is given and received within the specified time and before loss by the insured, the contract is terminated, provided always that the cancellation is for the purpose specified.[25]

[22] Ionides v. Hartford, 5 Hurl. & N. 944; 29 N. J. L. Ex. 36.

[23] Manlove v. Commercial Mut. F. Ins. Co., 47 Kan. 309; 27 Pac. Rep. 979; 21 Ins. L. J. 174.

[24] See Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425

[25] Emmott v. Slater Mut. F. Ins. Co., 7 R. I. 562. See sec. 1268, herein, as to cancellation by agreement in mutual companies.

§ 1644. Rescission and Cancellation—Insolvency—Appointment of Receiver—Termination of Business and Transfer of Assets.—A mere suspicion of insolvency and of abuse of the corporate franchises is not sufficient in itself to justify a member of a mutual company in lapsing his policy,[26] unless by the terms of the contract the assured has the right to cancel upon request at pleasure. A company may be adjudged insolvent and a receiver appointed and the policies ordered canceled, so as to bar members from recovering for subsequently occurring losses, and this is so notwithstanding the policy stipulates for notice to the assured of an intention to cancel.[27] If, however, the policy may under its terms be canceled at pleasure of the company upon notice, the policy is not canceled by merely making an assignment for the benefit of creditors, nor does the mere institution of proceedings in insolvency have that effect; a decree of dissolution must be obtained, although if such proceedings are commenced, the assured may legally demand a cancellation where it is stipulated that the assured shall have a right to cancel upon request.[28] But if a mutual company being insolvent votes to cancel its policies, and notifies the assured thereof, the latter will be liable upon his premium note where he neglects to have his policy canceled.[29] If an insurance company terminates its business and transfers its assets to another company, the assured is justified in terminating his contract, and is thereupon entitled to receive an equitable proportionate share of the assets of the company,[30] and if the company abandons its plan of insurance, and thereby reduces the fund on which a member has a right to rely for payment of endowments under his policy, he has a right to rescind the contract.[31]

[26] Taylor v. Charter Oak L. Ins. Co., 59 How. Pr. (N. Y.) 468.

[27] Clark v. Manufacturers' Mut. F. Ins. Co., 130 Ind. 332; 30 N. E. Rep. 212; affirmed in Reliance Lumber Co. v. Brown (Ind. App. 1892), 30 N. E. Rep. 625.

[28] Relfe v. Commercial Ins. Co., 10 Mo. App. 393.

[29] Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433.

[30] Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264.

[31] People's Mut. Assur. Fund v. Bircken, 92 Ky. 297; 17 S. E. Rep. 625.

When a mutual company becomes insolvent, the order of court appointing a receiver cancels all existing policies.[32]

§ **1645. Cancellation by Receiver—Statutory Provision—Certificates of Indebtedness.**—In New York, the receiver may with the consent of the parties cancel and discharge subsisting contracts in the nature of insurance, etc., by "refunding to such party the premium or consideration, ... or so much thereof as shall be in the same proportion to the time which shall remain of any risk assured by such engagement as the whole premium bore to the whole term of such risk." [33] It is further provided by statute in the same state that upon written request of the policy holder, and upon receipt of any policy in force, the receiver of any fire company may cancel policies and issue certificates of indebtedness.[34]

§ **1646. What Acts do not Effect a Cancellation.**—The company cannot effect a cancellation of the policy by making upon its books an entry of the cancellation, such act being without the knowledge or consent of the insured. In such case the insured is not bound by such entry, nor is the same admissible in evidence to show a cancellation.[35] If the cancellation is effected by a written instrument, the execution of which is induced by the false representations of the company's agent, the assured is not thereby estopped from asserting his rights under the policy.[36] The fact that the company does not, after notice of additional insurance in violation of the conditions of the policy, elect to cancel the same under a right reserved to cancel upon notice and return of a ratable proportion of the premium, does not justify the legal conclusion that it elects to continue it in force.[37]

[32] Davis v. Shearer, 90 Wis. 250; 62 N. W. Rep. 1050.

[33] 2 Rev. Stats. 470, sec. 75; Jones' Business and Corporation Laws, 267.

[34] New York Gen. Laws, 1892, c. 38, art. 3, sec. 123; 3 Rev. Stats. 1661; Laws 1880, c. 110, sec. 4; Hamilton's Stats. Rev. of Ins. L. of N. Y. 1892, p. 60, sec. 123.

[35] King v. Enterprise Ins. Co., 45 Ind. 43.

[36] Holden v. Putnam etc. Ins. Co., 46 N. Y. 1.

[37] Johnson v. American F. Ins. Co., 41 Minn. 396; 43 N. W. Rep. 59.

§ 1647. Rescission by Assured and Surrender of Policy.—If an assurance has been effected and the perils insured against exist for any period of time, however short, the assured is not entitled to insist that the policy be canceled and part of the premium returned to him.[38] But the assured may rescind where no risk has ever attached under the policy; as where a warranty, although made without fraud, is untrue when made.[39] If there is a breach of the contract conditions by the company, the insured may rescind,[40] and although the policy is not actually surrendered, yet if it is clearly evident that such surrender was attempted to be made by the assured, it is a sufficient surrender; as where the company's agent, pursuant to an order of the company to cancel, told the assured that the policy was canceled, and the latter went to the agent's office intending to leave the policy there, but did not do so, owing to the agent's absence, and negotiated for other insurance as a substitute for that evidenced by the canceled policy, it was held that there was a cancellation by both parties.[41] If the policy is surrendered for cancellation under the terms of the policy, the same is thereby terminated, and its subsequent redelivery by the agent of the company after a loss, and with knowledge thereof, does not restore the contract.[42] It is held that there may be a rescission of the contract, on the refusal of the company to allow a rebate, where the contract is not repudiated by the company until after the premium for the third year is tendered.[43] If it is intended to surrender the policy and substitute another therefor, it is sufficient that the policy be surrendered after the expiration of the prior policy, in pursuance of a proposition made before the original con-

[38] Joshua Hendy M. Works v. American etc. Ins. Co., 86 Cal. 248; 21 Am. St. Rep. 33.

[39] James v. Insurance Co. of North America, 90 Tenn. 604; 18 S. W. Rep. 260.

[40] Lovick v. Provident L. Assn., 110 N. C. 93; 14 S. W. Rep. 506; 21 Ins. L. J. 332; Meade v. St. Louis Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 1. See c. xxxv, herein, on return of premium.

[41] Hopkins v. Phœnix Ins. Co., 78 Iowa, 344; 43 N. W. Rep. 197.

[42] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608; 53 Hun (N. Y.), 220; 40 N. Y. St. Rep. 426; 28 N. E. Rep. 653; 21 Ins. L. J. 31.

[43] Thompson v. New York L. Ins. Co., (Or. 1892), 21 Or. 466; 28 Pac. Rep. 623.

tract expired and not dissented from.[44] Where a policy on the life of plaintiff's husband was issued without the latter's knowledge, and contrary to the rules of the company, it was held that if the plaintiff was innocent of any fraud, and was induced by fraudulent representations of defendant's agent to make the application, she might rescind the contract and recover the premiums paid on discovering the fraud.[45] If it is agreed that upon surrender of the policy the premium note shall be delivered up the insured must surrender directly to the company or its authorized agent. A delivery to a stranger with notice to the company is not sufficient to release the insured.[46] The insured must tender the policy for cancellation before it is forfeited by him by a breach of its conditions.[47]

§ **1648. Cancellation by Request of Assured Under Terms of Policy.**—The standard fire policy of New York provides that it shall be canceled at any time by the request of the assured or by the company, by giving five days' notice of such cancellation, and that if the policy be canceled, or shall become void or cease, and the premium has been paid, the unearned portion shall be returned on surrender of the policy or last renewal, the company retaining the customary short rate, except that when the policy is canceled by giving notice it shall retain only the pro rata premium.[48] And where by its

[44] Train v. Holland etc. Ins. Co., 68 N. Y. 208; Morrison v. American Popular L. Ins. Co., 17 Fed. Rep. 832; 5 Ins. L. J. 752.

[45] Fisher v. Metropolitan L. Ins. Co., 162 Mass. 236; 38 N. E. Rep. 503; 24 Ins. L. J. 129.

[46] American Ins. Co. of Chicago v. Woodruff, 34 Mich. 6.

[47] Colby v. Cedar Rapids Ins. Co., 66 Iowa, 577.

[48] See sec. 1393, herein. The Maine standard policy provides that "this policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks": Stats. Me. 1885-95, Supp. (Freeman), p.

stipulations the policy may be terminated, upon the request of the assured, upon repayment of both the "customary short rates" from the date of the policy and the "expenses of writing the risk," such expenses may not be included under the former clause, although such expenses will cover the agent's commissions for procuring the risk.[49] In a case in the United States supreme court a policy upon a marine risk for six months, dated April 5, 1880, was stipulated "to continue in force from the date of expiration until notice is given this company of its discontinuance, the assured to pay for such privilege pro rata for the time used." There was a loss by a sea peril on November 6th, and it was held that the act of insured in sending a check on October 9th for one monthly premium, from October 5th to November 5th, did not operate as a notice of discontinuance, but merely as a monthly payment.[50]

§ 1649. Right to Reject Policy not of Class Ordered. If one requests a policy of a particular class, he has the right to reject and return in a reasonable time a policy not of the class ordered, and he is not obligated to pay a note, because of his retention of said policy, where he has offered to return the same and has made no use thereof.[51]

§ 1650. Rescission and Surrender—Mutual Company—Withdrawal of Member.—A rescission and withdrawal of the policy or certificate in a mutual company will, where the agreement is completed, terminate the contract and release the member from subsequently accruing liability to assessments,[52] but such rescission must be based upon some right re-

334, c. 49. See, also, Supp. Pub. Stats. Mass. 1882-88, p. 532, c. 214, sec. 60, same as Maine; Laws Minn. 1895, p. 417, c. 175, sec. 53, same as Maine. The Pennsylvania Act (Pub. Laws, 1891, 22, sec. 1) requiring the insurance commissioner to prepare and file a standard form of fire insurance policy is unconstitutional: 1 Pepper & Lewis' Dig. 1700-1894, p. 2384, sec. 95; O'Neil v. American F. Ins. Co., 166 Pa. St. 72; reversing 3 D. R. 778. But see Id., p. 2385, secs. 96, 97; Act 1891, Pub. Laws. 22, secs. 2, 3.

[49] State Ins. Co. v. Homer, 14 Colo. 391; 23 Pac. Rep. 788.

[50] Greenwich Ins. Co. v. Providence etc. Steamship Co., 119 U. S. 481; 7 Supr. Ct. Rep. 292.

[51] Jones v. Gilbert, 93 Ga. 604; 20 S. E. Rep. 48.

[52] Section 1268, herein.

served under the charter, by-laws, or certificate itself, or must rest upon some statute or arise from the mutual consent of the parties. Thus, a mere declaration of the assured, made after the policy and premium note are delivered to the respective parties, that he abandons the whole thing and will have nothing more to do with it, does not effect a cancellation and release the assured from his liability on his premium note.[53] A question sometimes arises as to what acts of a mutual company are sufficient under its by-laws to effect or consummate a cancellation of the policy. But if the assured voluntarily surrenders his policy, clearly intending that it shall be canceled, and the company accepts such surrender for that purpose, the fact that there has not been at the time of the loss a strict compliance with the by-laws as to matters merely formal, such as a formal cancellation and erasure of the member's name from the books, will not render the company liable.[54] But it is held that although a member of a mutual company directs his name to be taken off the books of the company, and pays all assessments then due, as required by the charter, his membership is not thereby terminated if he does not surrender his policy, the charter also requiring that his policy be returned to the secretary.[55] So where by the terms of the contract a member of a mutual insurance company might obtain a cancellation of his contract, by the payment of all assessments due from him at the time of the request and a fee of two dollars for cancellation, and a member wishing to have his contract terminated paid the cancellation fee, but neglected to pay an assessment due at the time of surrendering his contract, it was held that the insurance and membership contract remained in force.[56] Where an endowment benefit association incorporated under the statute employs paid agents to solicit business contrary thereto, members to whom benefit certificates are issued have a right to have the contract termin-

[53] McAllister v. New England L. Ins. Co., 101 Mass. 558.

[54] Farmers' Ins. Co. v. Wenger, 90 Pa. St. 220.

[55] Schroeder v. Farmers' Mut. F. Ins. Co., 87 Mich. 310; 49 N. W. Rep. 536 (one judge dissenting).

[56] Burmood v. Farmers' Union Ins. Co., 42 Neb. 598; 60 N. W. Rep. 905.

ated and the accumulated fund distributed among the certificate holders.[57] If under the charter of a mutual fire insurance company any member "may withdraw therefrom by notice in writing to the secretary and paying all dues and liabilities," and by a provision of the policy the insurance "may be terminated at any time at the request of the assured, in which case the association shall retain only the customary short rates for the time the policy has been in force," the company is entitled, in case of an application for cancellation, to such time as may be necessary to determine the amount of the applicant's liability, and if the member desires cancellation of his policy from the date of the application, he must pay his full share of the liabilities to that date.[58]

§ **1651. Right of Assured to Surrender Life Policy Dependent upon Beneficiary's Consent.**—In determining the right of one whose life is assured for the benefit of another, the same principle is involved as in cases where the question arises as to the right to change a beneficiary, which has already been considered,[59] but it may be stated here that except there be some right reserved in the contract, or unless the act be within the intent of some permissive statute, one whose life is insured for the benefit of another cannot rescind or surrender the policy without the beneficiary's consent.[60] There are cases, however, involving the same principle which are decided to the contrary.[61] In support of the rule above stated, it is held that a policy procured by a wife upon her husband's

[57] Fogg v. Supreme Lodge of the Order of Golden Lion, 159 Mass. 9; 31 N. E. Rep. 289.

[58] State Mut. F. Ins. Assn. v. Brinkley S. & H. Co. (Ark. 1895), 31 S. W. Rep. 157.

[59] Secs. 740, 741, herein.

[60] Lattan v. Royal Ins. Co., 45 N. J. 453; Re Booth, 11 Abb. N. C. (N. Y.) 145; Washington Cent. Bank v. Hume, 128 U. S. 195; Schneider v. United States L. Ins. Co., 4 N. Y. S. 797; Rieker v. Charter Oak L. Ins. Co., 27 Minn. 193; 38 Am. Rep. 289; Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio St. 292; Chase v. Insurance Co., 67 Me. 85; Unity Mut. etc. Assn. v. Dugan, 118 Mass. 219; Knapp v. Homœopathic Mut. L. Ins. Co., 117 U. S. 411.

[61] See change of beneficiary under chapters on beneficiaries herein.

life, payable to herself on his death, or to her children in case of her decease before his, cannot be surrendered by him to the company after her death without the children's knowledge and against their interests, even though the children did not know of the insurance until after his death, and the surrender was made by him as guardian of the children, and although all except one of the children had attained majority.[62] And the fact that he has obtained a divorce from his wife for adultery will not enable him to have the policy reformed, notwithstanding an intention existing when the policy was issued that it should not be payable to her in such case where such intention was not communicated to the company.[63] But in case the beneficiary dies, the intent to benefit such person is defeated, and thereafter he may surrender the policy without the consent of the legal representatives of the beneficiary, and effect another policy payable to another person.[64] If, however, the husband fraudulently represents that his wife is dead he cannot surrender the policy and have it canceled so as to affect her rights under the policy.[65]

§ 1652. Proposition to Cancel must be Accepted or Declined as a Whole if Indivisible.—If the policy is surrendered for cancellation upon a proposition which is indivisible, the company cannot cancel by accepting a part of the conditions and rejecting other conditions, but must accept or decline the proposition as a whole. If accepted in part only, there is no fulfillment of the conditions. Thus, where the company's agent proposed to cancel the policy in whole or in part, and it was returned to him with a direction that the risk be placed in another company, it was held that the company's

[62] Whitehead v. New York L. Ins. Co., 63 How. Pr. (N. Y.) 394; 33 Hun (N. Y.), 425. See People v. Globe L. Ins. Co., 15 Abb. N. C. (N. Y.) 75. See, also, Watts v. Phœnix Mut. L. Ins. Co., 16 Blatchf. (U. S.) 228.

[63] Goldsmith v. Union Mut. L. Ins. Co., 17 Abb. N. C. (N. Y.) 15.

[64] Continental L. Ins. Co. v. Palmer, 42 Conn. 60; Bickerton v. Jacques, 28 Hun (N. Y.), 119; 12 Abb. N. C. (N. Y.) 25; Walsh v. Mutual L. Ins. Co., 61 Hun (N. Y.), 91.

[65] Knapp v. Homœopathic Mut. L. Ins. Co., 117 U. S. 411.

agent could not cancel without complying with the condition upon which the cancellation was ordered.[66] So also where the assured requested the underwriters to cancel an existing policy upon a boat, where there had been a partial but unadjusted loss, and to issue a new policy for the same amount but with additional privileges, and offering to remit the increased premium for the added privileges, it was held that the company could not refuse to agree to the proposed change, and "cancel pro rata" and credit unearned premiums on outstanding premium notes, for the proposal to cancel must be accepted or rejected as an entirety.[67]

§ 1653. Want of Insurable Interest as a Ground of Rescission or Cancellation.—If the policy is issued to one who has no insurable interest in the property insured, the policy holder may rescind.[68] But if a policy is taken out on the life of another by one who at the time has an insurable interest, it is not a sufficient ground for cancellation that such interest has ceased, and the payee has become hostile to the insured, where it does not appear that the insured's life is in danger, and so notwithstanding an offer to return the premiums.[69]

§ 1654. Rescission or Avoidance of Compromise or Release.—If the original contract of insurance is surrendered, the sole consideration of such release being a void policy, such release may be avoided without offering to return the

[66] The court said: "The first proposition of the Hudson Company was to cancel the policy in whole or in part, to place the risk in the Lancashire Company, or return the premium as the plaintiff might elect. He assented that the policy might be canceled for the whole, and the property reinsured by them in the Lancashire Company. The two were coupled together, and there is no evidence that the plaintiff agreed that the policy should be canceled without a reinsurance, and as the Hudson Company did not reinsure, they cannot insist upon the cancellation. There was no agreement of the parties": Pow v. Hudson, 2 Fed. Rep. 432, 434, 435.

[67] Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317; 1 Cin. (Ohio) 349.

[68] New Holland Turnpike Co. v. Farmers' Mut. Ins. Co., 144 Pa. St. 541; 22 Atl. Rep. 923; 48 Leg. Intell. 527.

[69] Peckham v. Grindley, 17 Abb. N. C. (N. Y.) 18.

void policy.[70] And where the policy was for specified sums on a dwelling-house, barn, and produce therein, and the barn and its contents were destroyed, the amount of the insurance upon the produce being paid upon a release being executed to the company stating that said amount was received in full satisfaction of the loss, "canceling" the entire amount of insurance on all the property, it was held that there was no sufficient consideration for the release to discharge the company from liability as to the barn, and that the release did not cancel the policy beyond the amount paid.[71] And if a compromise for a less sum than the amount of the loss is obtained by the fraudulent statements of the company's adjuster, such compromise may be rescinded upon an offer to return the payment made under such fraudulent compromise, there being a sufficient tender and surrender of the same.[72]

§ 1655. Right of Agent to Rescind or Cancel—Notice of Cancellation to Agent or Broker.—If the company's agent is instructed to cancel, but through negligence or otherwise he fails to notify the assured, there is no cancellation;[73] and although such agent may notify the assured, yet if he fails to return or tender a ratable proportion of the premium, there is no cancellation,[74] although if notice is given the broker and he notifies the insured, who surrenders the policy, there is a cancellation, even though no money is tendered by the company to the broker to whom the company had charged the premium.[75] Though power may be given to an agent to procure insurance upon a building, yet this does not authorize him

[70] Dayton Ins. Co. v. Kelly, 24 Ohio St. 345.

[71] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354.

[72] Berry v. American Central Ins. Co., 132 N. Y. 49; 43 N. Y. St. Rep. 400; 21 Ins. L. J. 455; 30 N. E. Rep. 254; 45 Alb. L. J. 402; Holden v. Putnam F. Ins. Co., 46 N. Y. 1.

[73] Scott v. Sun Fire Office, 133 Pa. St. 322; 19 Atl. Rep. 360; Watertown F. Ins. Co. v. Rust, 141 Ill. 85; 40 Ill. App. 119; 30 N. E. Rep. 772; London & L. F. Ins. Co. v. Turnbull, 86 Ky. 230; 5 S. W. Rep. 542. See McLean v. Republic Ins. Co., 3 Lans. (N. Y.) 421.

[74] Franklin F. Ins. Co. v. Massey, 33 Pa. 221.

[75] Stone v. Franklin F. Ins. Co., 105 N. Y. 543; 12 N. E. Rep. 45 (one judge dissenting). See Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189.

to cancel a policy procured by him.[76] But if an insurance agent, with general authority from the owner to keep his property insured, cancels one policy on order of the company issuing it, and immediately reinsures in another company, paying the premium, notifying the assured by mail of the transaction, and depositing the policy in his safe for the assured, this is a sufficient cancellation of the first and delivery of the second policy.[77] The right of an agent to rescind or cancel, and the effect of giving notice of cancellation to an agent or broker, has, however, been fully considered in another part of this work.[78]

§ **1656. Cancellation by Mistake of Agent.**—The legal owners of the property, and also owners by indorsement to them of a certificate of insurance at the time of the alleged cancellation, cannot be bound by a cancellation ordered by mistake as to the meaning of a telegram sent by them to one who has purchased goods and effected insurance thereon under an agreement with said parties.[79] And the assured is not bound by a cancellation made by a broker by mistake where it is no part of the broker's duty to cancel, and he is not authorized by the assured so to do.[80] It is held in New York that if a policy is returned for cancellation by mistake of the broker's clerk, even though done without the knowledge or consent of the assured, it precludes the assured from maintaining an action on said policy.[81] The better opinion is, however, that there must be some express or implied authority from the principal, and that the evidence of an implied authority must be clear to warrant an exercise by the broker or agent of the right of the assured to cancel, and the mere fact that the policy is left in the broker's hands does not of itself justify him in canceling a policy. Such is the rule established by the

[76] So held in Bolan v. Fire Assn. of Philadelphia, 58 Mo. App. 225.

[77] Dibble v. Northern Assur. Co., 70 Mich. 1; 14 Am. St. Rep. 470.

[78] See secs. 451, 454, 636-642, herein.

[79] Marsh v. Northwestern National Ins. Co., 3 Biss. (C. C.) 351.

[80] Xenos v. Wickham, 14 Com. B., N. S., 861; 36 L. J. Com. P. 313; reversing 13 Com. B., N. S., 381; 14 Com. B., N. S., 435; 33 L. J. Com. P. 13.

[81] Standard Oil Co. v. Triumph Ins. Co., 6 N. Y. S. C. 300.

English decisions, where the authority of a broker is much more extensive than here.[82]

§ **1657. Partner's Consent to Cancellation or Substitution Binds Firm.**—A partner may by consenting to the cancellation of a policy or substitution of another policy, bind the firm to the extent of the partnership interest, and this is so in case of a cancellation, even though the policy is not formally surrendered, such act being only an evidence of the cancellation.[83] But a mere agreement made by one with certain parties to purchase merchandise and ship the same to them and effect insurance thereon, of which they become owners before the alleged cancellation, does not constitute the purchasing party a partner with authority to bind said parties by a cancellation of the policy.[84]

§ **1658. Release by Part of the Insured Parties.**—A release by part of the insured parties does not bind those of the insured who do not join therein, and who have no knowledge of its execution, where it is not intended when executed to have such effect, or where the release is obtained by insurers with intent to defraud those not signing.[85]

§ **1659. Wrongful Cancellation or Termination of Contract by Assurer.**—If there is a wrongful cancellation or termination of the contract by the company, and it refuses

[82] See sec. 636, herein.

[83] Bingham v. North American Ins. Co. (Wis.), 43 N. W. Rep. 494; Whiteman Bros. v. American Cent. Ins. Co., 14 Lea (Tenn.), 327.

[84] Marsh v. Northwestern National Ins. Co., 3 Biss. (C. C.) 351.

[85] Lumberman's Ins. Co. v. Preble, 50 Ill. 332. As to release of claim procured through fraud, see Henry v. Imperial Council O. of W. F. (N. J. Ch. 1894), 29 Atl. Rep. 508; Northwestern Mut. L. Ins. Co. v. Woods, 54 Kan. 663; 39 Pac. Rep. 189; Springfield F. & M. Ins. Co. v. Hull (Ohio S. C. 1894), 37 N. E. Rep. 1116; Titus v. Rochester German Ins. Co. (Ky. C. A. 1895), 41 Cent. L. J. 110; Silk v. Mutual Res. F. L. Assn. (Pa. S. C. 1894), 23 Ins. L. J. 334; 28 Atl. Rep. 445; Lord v. American Mut. Acc. Assn. (Wis. 1895), 61 N. W. Rep. 293; Wabash Valley Prot. Union v. James (Ind. A. C. 1894), 35 N. E. Rep. 919; Heinlein v. Imperial L. Ins. Co., 101 Mich. 250; 25 L. R. Annot. 627; Star Acc. Co. v. Sibley (Ill. A. C. 1895), 27 Chic. L. News, 204.

to receive premiums or to longer recognize the policy as binding upon it, the question arises as to the rights of the assured in the premises. A Connecticut case states, however, what seems to be a result of the authorities upon the subject. There the company insisted that the policy had been forfeited by breach of a condition therein by the assured. The contract was not rescinded by the assured, but he brought an action to recover back the premiums paid, relying upon an implied promise to keep the policy alive. The court refused to entertain the action, and it was declared that in such case the policy holder had only three remedies: 1. To consider the policy terminated and recover its just value in a proper action therefor; 2. To institute an equitable proceeding to adjudge the policy in force, and the question of forfeiture could then be determined; 3. To tender the premiums, and when the policy became payable, an action might be brought upon the policy and the question of forfeiture be then tested.[86] In a Missouri case, where the insured rescinded and sued to recover the premiums paid, it was held that he might recover at least all the money paid under the contract; for, as was suggested by the court, the judgment might afford far from an adequate measure of damages;[87] and it is so held in West Virginia.[88] So in New York it is held that for a wrongful cancellation for nonpayment of premiums the plaintiff was entitled to have the policy declared in force, but that it should also be adjudged that the premiums due with proper interest be paid.[89] In a case in Virginia, where one's life was insured for the benefit of his child, and the company repudiated the contract, it was held in a suit brought by the child, during the pend-

[86] Day v. Connecticut Gen. L. Ins. Co., 45 Conn. 480; 29 Am. Rep. 693; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51.

[87] McKee v. Phœnix Ins. Co., 28 Mo. 383; 75 Am. Dec. 129.

[88] McCall v. Phœnix Mut. L. Ins. Co., 9 W. Va. 237; 27 Am. Rep. 558.

[89] Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; 29 Am. Rep. 200. See Whitehead v. New York L. Ins. Co., 102 N. Y. 143; Fischer v. Hope Mut. L. Ins. Co., 69 N. Y. 161. In this case the insuring company was succeeded by a new company, and the question arose as to policy holders' redress if not accepting policy from the succeeding company.

ency of which the insured died, that a recovery could be had for the value of the policy, less unpaid premuims estimated as of the date of the wrongful cancellation by the company.[90] So a wife may recover the value, at the time of a wrongful cancellation of a policy upon her husband's life.[91]

§ 1660. Strict Compliance with Stipulation as to Rescission or Cancellation Required unless Waived—When Stipulation not Binding.—If the contract has been fairly entered into, and has taken effect, the right to rescind or cancel can only be exercised by either party acting strictly in compliance with the exact stipulations of the policy relating thereto. If the cancellation is asked for by the company, no burdens can be imposed upon the assured necessitating trouble and expense. The demand must also be unconditional, except in certain cases where the right to cancel is absolute upon breach of condition.[92] But the party against whom the abrogation of the contract is claimed may waive strict compliance with such stipulations.[93] A contract stipulation, however, that the insured cannot cancel the policy, to take out insurance in another company, without incurring a forfeiture of his premium, does not bind him where the policy in question was substituted by the company's agent for other policies, giving him a right to cancel, and the insured relied upon the agent for the insertion of a similar clause in the substituted policy,

[90] Clemmett v. New York L. Ins. Co., 76 Va. 355.

[91] Brooklyn L. Ins. Co. v. Week, 9 Ill. App. 358. See Phœnix Ins. Co. v. Baker, 85 Ill. 210. See, also, as sustaining the above rule, Insurance Co. v. Tullidge, 39 Ohio St. 240; Heline v. Philadelphia L. Ins. Co., 61 Pa. St. 107; Piedmont etc. L. Ins. Co. v. Fitzgerald, 1 Tex. Civ. Cas. 784; New York L. Ins. Co. v. Statham, 85 Ill. 210.

[92] Runkle v. Citizens' Ins. Co. of Pittsburgh, 6 Fed. Rep. 143; Landis v. Home Mut. F. & M. Ins. Co., 56 Mo. 591; Planters' Ins. Co. v. Walker Lodge. W. & W. (Tex.) 415; International L. A. Co. v. Franklin I. T. Co., 66 N. Y. 119; Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189; Chase v. Phœnix etc. Ins. Co., 67 Me. 85; Griffin v. New York Cent. Ins. Co., 100 N. Y. 417; 30 Hun (N. Y.), 299; 53 Am. Rep. 202; Mohr Distilling Co. v. Ohio Ins. Co., 12 Fed. Rep. 74; Peoria F. & M. Ins. Co. v. Botto, 47 Ill. 516; Bennett v. Insurance Co., 115 Mass. 241.

[93] Bennett v. Insurance Co., 115 Mass. 241.

and there was a concealment by the agent of the fact that said clause was not contained in the substituted policy.[94]

§ 1661. Rights relating to Rescission or Cancellation must be Exercised within a Reasonable Time.—The right to rescind or cancel a policy where the policy would otherwise continue in force must be exercised within a reasonble time after such right accrues. Thus, if a right to rescind for breach of contract is claimed by the assured, he must act within a reasonable time after the claimed breach, and a delay of three and one-half years, the assured during all that time treating the contract as in force, knowing the fact of the breach thereof, will prevent a rescission.[95] And it is held that if the assured requests the company to cancel, it must refuse to accept said proposition within a reasonable time; if it remains silent for two and a half months after receiving such request, and then sends a notice bearing a date prior to that of the loss, but postmarked a day later, refusing to cancel, it will be estopped to deny that it has assented to the cancellation. In this case the point was raised that the validity of the policy issued by another company was dependent upon whether the prior policy was canceled.[96] But if a time is specified within which the right to cancel must be exercised, such limitation governs, and if the right is not exercised within the specified time, it is lost.[97]

§ 1662. Company cannot Cancel when Loss is Imminent. Although a reserved right to cancel a policy may be exercised in case the risk is subjected to a greater danger of fire than existed when the policy was issued, provided the right is exercised in good faith, yet if the act of cancellation will operate as a fraud upon the assured, by reason of some special emergency, such as an approaching conflagration, or a probable and threatened peril from fire which makes the liability to loss imminent,

[94] Hartford S. B. I. & Ins. Co. v. Cartier, 89 Mich. 41; 50 N. W. Rep. 747.

[95] Margut v. United Brethren Mut. Aid Soc. (Pa. 1892), 148 Pa. St. 185; 23 Atl. Rep. 896; 1 Advance Rep. 533.

[96] Walters v. St. Joseph F. etc. Ins. Co., 39 Wis. 489.

[97] Tough v. Provincial Ins. Co., 20 L. C. J. Q. B. 168.

the privilege reserved to terminate the policy on notice cannot be exercised, for to admit such a right would render policies valueless. And in case the notice of cancellation is given in the face of such imminent danger, it cannot aid the assurer that the property is actually destroyed by fire from another quarter. On the other side, however, the assured ought to be obligated to use every reasonable endeavor to avail himself of such means as are afforded of protection from an approaching conflagration, and which every prudent man would use, especially so if his neglect so to do is such as to clearly evidence an intent to defraud the company.[98]

§ 1663. Cancellation and Rescission after Loss or Forfeiture.—As a rule, the right of the company to cancel a policy must be exercised before the rights of the assured thereunder have become fixed by a loss within the terms of the contract, although in certain cases of fraud and mistake which are noted under the sections herein relating to cancellation in equity the contract may be canceled. It is held, however, in a case in Canada that if the right to cancel for forfeiture is absolute, dependent upon notice merely, such notice may be given after a loss.[99] If the cancellation depends upon a return of the unearned premium, which is not paid until after the loss, and is then received in ignorance thereof, the insurer is not released from liability under the contract, for there is no cancellation,[100] even though the assured in such case signs a cancellation receipt.[101]

[98] Home F. Ins. Co. of New York v. Heck, 65 Ill. 111; approved in Lipman v. Niagara F. Ins. Co., 121 N. Y. 454. The rule is well settled that when a person undertakes to do an act upon notice from another, it is implied that he shall have a reasonable time after he is called upon to do the thing or render the service. The privilege reserved by the company to terminate the policy upon notice cannot be exercised under circumstances which would make it a fraud on the insured: Reversing Lipman v. Niagara F. Ins. Co., 48 Hun (N. Y.), 503. See Home Ins. Co. v. Heck, 65 Ill. 111; Imperial F. Ins. Co. v. Gunning, 81 Ill. 236.

[99] Bruce v. Gore Dist. Mut. Ins. Co., 20 U. C. C. P. 207.

[100] Hollingsworth v. Germania F. Ins. Co., 45 Ga. 294; Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.

[101] Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.

§ 1664. Cancellation in Equity after Policy has become Void or Inoperative.—As a general rule, a court of equity will not exercise jurisdiction to cancel a contract merely because it has become void or inoperative by reason of some fact which has taken place since its execution.[102] Although equity will entertain jurisdiction in cases of contracts generally to cancel a contract void upon its face.[103] And it is also held in numerous cases that a policy which has become void since its execution by reason of some fact not apparent upon its face, as in case of a breach of condition or fraud, misrepresentations, or concealment in its procurement, that equity will upon proper showing, decree a cancellation, not exercising such jurisdiction as a matter of right in the party, but in the court's equitable discretion.[104] So notwithstanding the rule, if the special circumstances of the case would render it unjust or oppressive for the policy to remain outstanding, the court will, under such circumstances assume equitable jurisdiction, and cancel performed and inoperative contracts, and it will also, under like circumstances and for like reasons, set aside contracts for defects not apparent upon their face, although such defects arise after their execution, and even though an action at law could have been maintained.[105] It is said, however, with much reason that if the objection does not appear upon the face of the instrument, it cannot be held that law affords that relief which is obtainable in equity.[106]

§ 1665. May the Policy be Terminated Eo Instanti on Notice—Reasonable Time.—It was held in the superior court of New York that notwithstanding a reservation in the

[102] Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatch. (C. C.) 142, per Shipman, J.; Connecticut Mut. L. Ins. Co. v. Bear, 26 Fed. Rep. 582.

[103] See Cornish v. Bryan, 10 N. J. Eq. (2 Stock.) 146; Hays v. Hays, 2 Ind. 28.

[104] Wilson v. Ducket, 3 Burr. 1361; Barker v. Walters, 8 Beav. 92; Atlantic Ins. Co. v. Lamar, 1 Sand. Ch. (N. Y.) 91; and cases cited in secs. 1674-1676, herein.

[105] Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatchf. (C. C.) 142, per Shipman, J.; citing Hamilton v. Cummings, 1 Johns. Ch. (N. Y.) 517; Hoare v. Bremridge L. R. 8 App. C. 22; Hartford v. Chipman, 21 Conn. 488; Ferguson v. Fisk, 28 Conn. 501.

[106] Fenn v. Craig, 3 Younge & C. 216.

policy enabling the company to cancel upon giving notice to the assured, that the latter was entitled to a reasonable time after notice, and that a notice given within a very short time before the fire and at a time of the day when insurance would be difficult to obtain, was unreasonable.[107] The court of appeals, however, did not sustain this ruling, but decided that inasmuch as there was no special emergency at the time, and as the notice was given in good faith, under a right reserved in the policy, that the cancellation was effected. The court said that although the rule was "well settled that where a person undertakes to do an act upon notice from another, it is implied that he shall have a reasonable time after he is called upon to do the thing or render the service, and no time for performance is specified, the law gives him a reasonable time"; but that the rule of reasonable time did not apply where the time of performance is fixed by the contract, and that if the obligation is only to continue until notice given to the other party, it cannot continue after the notice is given, and the court added that it was competent for the parties, had they so desired, to have stipulated that the company should carry the risk a reasonable time after notice, to enable the assured to secure insurance elsewhere, but not having so provided, the policy must be so construed according to its terms, and that a custom to give reasonable notice could not be admitted to control the explicit language used in the contract. In this case the question of tender of unearned premium was eliminated, since no premium had been paid.[108] It is held, however, in a Massachusetts case that the insured must give reasonable notice.[109]

[107] Lipman v. Niagara F. Ins. Co., 1 N. Y. St. Rep. 384; followed in Karelsen v. Sun Fire Office, 1 N. Y. St. Rep. 387.

[108] Lipman v. Niagara F. Ins. Co., 121 N. Y. 454; citing Mueller v. South Side F. Ins. Co., 87 Pa. St. 399; Grace v. American C. Ins. Co., 109 U. S. 278. See, also, Imperial F. Ins. Co. v. Gunning, 81 Ill. 236, where it is declared that if a company waits until after a loss, a court will not then rescind the contract.

[109] Massasoit Co. v. W. A. Co., 125 Mass. 110. See, also, Chadbourn v. German-American Ins. Co., 31 Fed. Rep. 533, where the policy provides that unless the premiums are paid within a certain time, the company may cancel the policy without notice. It is held that the mere nonpayment of premiums does not render the policy

§ 1666. Cancellation of Parol Contract—Notice.—The fact that a contract rests in parol does not enable it to be canceled, except upon notice,[110] such a contract being dependent upon the conditions of the ordinary policy issued in such cases.

§ 1667. Cancellation—Notice to the Insurer.—If the risk is incepted under an open policy of insurance, the insured cannot terminate the policy by merely giving notice to the insurer; the latter's consent is necessary.[111] And this rests upon the general principle already noticed, that except there be a right to rescind under the policy, or some statute provide otherwise, a policy cannot be terminated by one party, except by the consent of the other, subject to such exceptions as are noted under this chapter.

§ 1668. Cancellation—Notice to the Assured—To Mortgagee—To One of Several.—If the policy reserves a right to cancel upon notice, this means a notice to the assured or his agent authorized to receive notice.[112] The mere fact that an agent has authority to effect a particular insurance does not authorize him to accept notice of cancellation,[113] especially where the insurer has knowledge of the limits of the agent's authority, and that the policy has been delivered to assured.[114] If, however, the policy provides for notice of cancellation to insured or his representatives, an affidavit of defense may set up cancellation and notice to brokers who were assured's agents and representatives in all matters relating to insurances;[115]

void, but that some affirmative action must be taken by the company: O'Brien v. Prudential Ins. Co. (N. Y. City & Co. C. C. P.), 66 N. Y. St. Rep. 724; 33 N. Y. Supp. 67.

[110] Commercial Ins. Co. v. State, 4 Ind. (L. ed.) 449; 13 Week. Rep. 47.

[111] New York F. & M. Ins. Co. v. Roberts, 4 Duer (N. Y.), 141.

[112] London etc. Co. v. Turnbull, 86 Ky. 230; 5 S. W. Rep. 542; Lancashire Ins. Co. v. Nill, 114 Pa. St. 248; Van Loan v. Farmers' Mut. F. Ins. Co., 90 N. Y. 280.

[113] British-American Ins. Co. v. Cooper (Colo. 1895), 40 Pac. Rep. 147.

[114] Snedica v. Citizens' Ins. Co. (Mich. 1895), 64 N. W. Rep. 35.

[115] Royal Ins. Co. v. Wight, 5 U. S. C. C. A. 200; 55 Fed. Rep. 455; reversing 53 Fed. Rep. 340; distinguishing Grace v. Insurance Co., 109 U. S. 278; 3 Supr. Ct. Rep. 207.

and if the agent is a general agent employed to keep certain property insured to a certain amount, and he is intrusted with the charge of all the policies, although only for the purpose of preventing the inconvenience arising from frequently sending and returning policies, such an agent has authority to receive notice of cancellation.[116] Notice to a mortgagee is insufficient where the mortgagor is alone obligated to pay the premium,[117] and notice to one of several holding an interest under the policy is insufficient.[118] But it is held in Pennsylvania that notice of cancellation to the mortgagee alone to whom the loss is payable is sufficient.[119]

§ **1669. Cancellation—Notice by Mail must be Received.**—Notice of cancellation, if given by mail, must be received before loss by the party entitled thereto, or by his agent authorized to receive the same, otherwise there is no cancellation,[120] even though a by-law provides for service of the notice personally or by mail;[121] although, as has been noted under a preceding chapter, there are many cases which hold that in case of notice of the time of payment of premiums or assessments, the notices are sufficiently served by depositing the same properly mailed and addressed, even though never received. If personal notice is required, the assured may, by receiving it without objection, waive the personal service.[122] If there is no positive evidence that the letter, claimed to have contained the notice of cancellation, was ever mailed or even directed, there is no cancellation, especially in the face of a denial by the assured of a receipt of the letter.[123]

[116] Schauern v. Queen City Ins. Co., 88 Wis. 561; 60 N. W. Rep. 994.

[117] Chadbourne v. German etc. Ins. Co., 31 Fed. Rep. 533.

[118] Guggesberg v. Waterloo Mut. Ins. Co., 24 U. C. Ch. 350.

[119] Mueller v. South Side F. Ins. Co., 87 Pa. St. 399.

[120] Whiting v. Mississippi Valley Mut. Ins. Co., 76 Wis. 592; 45 N. W. Rep. 672; Tough v. Provincial F. Ins. Co., 20 L. C. J. Q. B. 168; Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608; Mullen v. Dorchester Mut. F. Ins. Co., 121 Mass. 171; Chadbourne v. German-American Ins. Co., 31 Fed. Rep. 533.

[121] Mullen v. Dorchester Mut. F. Ins. Co., 121 Mass. 171.

[122] Hollister v. Quincy Ins. Co., 118 Mass. 478.

[123] Whiting v. Mississippi V. Mut. Ins. Co., 76 Wis. 592; 45 N. W. Rep. 672.

§ 1670. Cancellation—Company must Give Notice—Sufficiency and Service of Same.—A reservation in the policy of a right to cancel upon notice and return of a proportionate premium is, as will be noted hereafter, a condition precedent to the exercise of the right of the company to cancel the policy,[124] and the rule applies as well to the notice as to the return of the unearned premium.[125] If the policy stipulates as to the manner and time of the notice, such condition must be observed,[126] except there be a waiver of the notice or its sufficiency by the assured, for a notice not otherwise sufficient may be accepted by the assured, and be thus made binding upon him as well as upon the party giving it;[127] and such notice must be unconditional and unequivocal. Something more than an expression coupled with a request for the performance of certain conditions, or that the policy will be canceled, is requisite. In other words, the assurer, under such a stipulation, cannot claim that a policy has been canceled, unless the notice be as provided one of actual cancellation, not of future conditional cancellation, nor a notice of doubtful meaning as to time or purpose.[128] If the policy provides that the insurance may be terminated at the option of the company at any time, it is canceled upon notice to the assured that the local agent has been instructed that the company will be no longer liable thereon;[129] and under a provision providing for termination at election of the company upon an increase of risk, notice of an intention to terminate is sufficient,[130]

[124] Section 1671, herein.

[125] Peoria etc. Ins. Co. v. Botto, 47 Ill. 516; distinguishing Fabyan v. Union M. F. Ins. Co., 33 N. H. 203.

[126] Landis v. Hume etc. Ins. Co., 56 Mo. 591.

[127] Columbia Ins. Co. v. Masonheimer, 76 Pa. St. 138.

[128] Lyman v. State Mut. Ins. Co., 14 Allen (Mass.), 329; Petersburgh Sav. etc. Ins. Co. v. Manhattan F. Ins. Co., 66 Ga. 446; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417; 53 Am. Rep. 202; American Ins. Co. v. Woodruff, 34 Mich. 6; Goit v. National Prot. Ins. Co., 25 Barb. (N. Y.) 189; Whiting v. Mississippi V. Mut. Ins. Co., 76 Wis. 592; 45 N. W. Rep. 672.

[129] Springfield F. & M. Ins. Co. v. McKennon, 59 Tex. 507.

[130] Albany City Ins. Co. v. Keating, 46 Ill. 394. See Peoria M. & F. Ins. Co. v. Botto, 47 Ill. 516.

and under such a stipulation the notice may be conditional.[131] And a notice to cancel, coupled with a promise to pay and a promise to call for the premium, is sufficient.[132] The principle that underlies these decisions, however, is that which has already been noted, and which precludes a party from destroying existing contract rights except upon a strict observance of the reservations contained in the contract itself, or some statute, or by agreement or waiver of his rights by the other party. The fact that the notice of cancellation was prepared on the third of the month, and that several months after the fire the notice was found among the papers of the assured, does not sufficiently prove its service.[133]

§ 1671. Cancellation — Company must Return or Tender Unearned Premium.—A reservation of a right to the company to cancel the policy at any time by giving notice to that effect and refunding a ratable proportion of the premium, is valid.[134] In such case the return of the proportionate premium or a tender of the same to the assured or to his agent authorized to receive the same is an essential part of the condition, and is a prerequisite or condition precedent to the cancellation. If the proportionate premium be not actually returned or tendered, the condition is not performed, and the policy continues in force, even though notice of the cancellation be given as specified. The authorities are well settled upon the point that actual payment must be made, and the returned proportionate premium be actually received by or tendered to the assured or his agent authorized to act in the premises, to release the company from its obligations under the contract.[135]

[131] Bergerson v. Builders' Ins. Co., 38 Cal. 541.

[132] Rumple v. Citizens' Ins. Co., 6 Fed. Rep. 143.

[133] Lattan v. Royal Ins. Co., 45 N. J. L. 453.

[134] Irwin v. National Ins. Co., 2 Disn. (Ohio) 68.

[135] Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28; Hollingsworth v. Germania Ins. Co., 45 Ga. 294; 12 Am. Rep. 575; Peoria M. & F. Ins. Co. v. Botto, 47 Ill. 516; Manlove v. Commercial Mut. F. Ins. Co., 47 Kan. 309; 27 Pac. Rep. 979; 21 Ins. L. J. 174; Insurance Co. v. Hartwell, 100 Ind. 566; Home Ins. Co. v. Curtis, 32 Mich. 402; White v. Insurance Co., 120 Mass. 330; Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465; Goit v. National Prot. Ins. Co., 25 Barb. (N. Y.)

This rule, however, does not apply to casese where the policy expressly stipulates for termination at any time at the option of the company by notice to the assured, unless there be a waiver by the assured of his rights under the contract, and the burden of such proof is upon the company.[136]

§ **1672. Cancellation—What is not a Sufficient Payment or Tender of the Unearned Premium.**—The acceptance of the unearned premium after the loss, but in ignorance thereof, or even with a knowledge of the loss by the insurer and assured, will not release the company,[137] although in the latter case circumstances might exist which would make the surrender of the policy and acceptance of the return premium under a distinct compromise or adjustment binding upon both parties. So a mere statement of the company's agent that he is ready to pay the unearned premium is insufficient, where he does not actually pay it until after the loss.[138] So

189; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.), 329; Griffin v. New York Cent. Ins. Co., 100 N. Y. 417; Chadbourne v. German-American Ins. Co., 31 Fed. Rep. 533; Pottsville Mut. Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. St. 137; Franklin F. Ins. Co. v. Massey, 33 Pa. 221; Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28. But see Newark F. Ins. Co. v. Sammon, 11 Ill. App. 230. If the policy provides that the company by which it is issued may cancel the same, and that upon cancellation the unearned portion of the premium shall be returned on surrender of the policy, it is held necessary to make an actual return or tender of the unearned premium, in order to cancel the policy: Tisdell v. N. H. F. Ins. Co. (N. Y. City Super. Ct.), 65 N. Y. St. Rep. 306; 32 N. Y. Supp. 166. In this case it appeared that notice had twice been served by the company upon the insured; that the company had elected to cancel the policy, and that the unearned premium had been placed in the hands of one of the company's agents, subject to plaintiff's order. It was admitted by the company, however, that no actual tender of the unearned premium had been made. The plaintiff admitted that there had been no tender or surrender of the policy or demand made for the unearned premium.

[136] Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28; Ætna Ins. Co. v. Maguire, 51 Ill. 342.

[137] Hollingsworth v. Germania Ins. Co., 45 Ga. 294; 12 Am. Rep. 579; Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.

[138] Hollingsworth v. Germania Ins. Co., 45 Ga. 294; 12 Am. Rep. 579.

the assured's obligation for premiums in a mutual company must be surrendered, as in case of a premium note;[139] and the demand for a surrender and offer to return the premium note is insufficient where the company retains the right to make assessments up to the actual day of cancellation.[140] So if the company has taken the insured's promissory note for the premium, the unearned premium must nevertheless be returned,[141] and a credit upon the company's books of the unearned premium is not a performance of the condition, although it is subject to the order of the assured.[142]

§ 1673. Cancellation—When Actual Payment or Tender of Unearned Premium Unnecessary.—The rule stated under the last section is subject to such exceptions as may arise from agreement of the parties, from waiver or rescission in cases of fraud or fraudulent misrepresentation or concealment, or where the policy is forfeited by breach of condition. Thus, the assured may agree to accept in full satisfaction a less amount than the ratable proportion of the premium due, in which case the condition as to return of a proportionate premium is sufficiently performed.[143] So if the minds of the parties have met upon the point that there is an actual cancellation, tender of the unearned premium is unnecessary; as in case the assured voluntarily surrenders the policy and agrees with the company's agent, at the latter's request, that the return of such proportionate premium may be postponed, this constitutes a cancellation;[144] and if the company's authorized agent is induced by the assured to believe that he agreed to the cancellation without payment of the unearned premium, he will be estopped to claim nonperformance of the condition as to payment.[145] So a tender is unnecessary where the insured has

[139] Landis v. Home etc. Ins. Co., 56 Mo. 591; Chadbourne v. German-American Ins. Co., 31 Fed. Rep. 533; Ætna Ins. Co. v. Webster, 6 Wall. (U. S.) 129.

[140] Landis v. Home Mut. F. Ins. Co., 56 Mo. 591.

[141] Home Ins. Co. v. Curtis, 32 Mich. 402; 5 Ins. L. J. 120.

[142] Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465.

[143] Ætna Ins. Co. v. Weissinger, 91 Ind. 297.

[144] Bingham v. Insurance Co. of North America, 74 Wis. 498; 43 N. W. Rep. 494.

[145] Hopkins v. Phœnix Ins. Co., 78 Iowa, 344; 43 N. W. Rep. 197.

not paid the premium, or is indebted to the company on the premium account for a sum equal to, or in excess of, the returned premium.[146] And it is also so held where no part of the premium has been actually paid, but credit therefor has been given to the broker.[147] And where both parties expressly understand that the policy is canceled, formal tender of the premium is not required, and a direction to the agent to procure other insurance in other companies evidences an intent that the unearned premiums should be used for that purpose.[148] And the company may insist upon the invalidity of the policy for a breach of its conditions relating to forfeiture, without offering to return the unearned premium.[149] And the rule requiring a payment or tender of the unearned premium, as a condition precedent to cancellation, has no application to a case resting upon the fraud or fraudulent misrepresentations of the assured concerning a fact material to the risk.[150]

§ **1674. When Equity will Rescind or Cancel—Generally.**—Whether a court of equity will entertain jurisdiction or not in the matter of an application to have a policy canceled or delivered up rests in the sound discretion of the court, not arbitrarily exercised, but a discretion regulated and governed by the general principles appertaining to equity, and applied to the case presented by the bill under which the relief prayed for is based, and although equity may have jurisdiction to entertain the suit by reason of the allegations of the bill, yet if under the case made by the bill it is inexpedient to exercise such jurisdiction, and it would be a more reasonable and proper exercise of that discretion which the court has in bills to can-

[146] Bergeson v. Builders' Co., 38 Cal. 541.

[147] Stone v. Franklin Ins. Co., 105 N. Y. 543; 12 N. E. Rep. 45.

[148] Hillock v. Traders' Ins. Co., 54 Mich. 531.

[149] Phœnix Ins. Co. v. Willis, 70 Tex. 12; 6 S. W. Rep. 825; Harris v. Royal Canadian Ins. Co., 53 Iowa, 236; 9 Ins. L. J. 525; Albany City Ins. Co. v. Keating, 46 Ill. 394; International L. Ins. Co. v. Franklin F. Ins. Co., 66 N. Y. 119; 5 Ins. L. J. 371.

[150] Blaser v. Milwaukee Mechanics' Mut. Ins. Co., 37 Wis. 31.

cel to leave the parties to their remedy at law, rather than retain the bill and exercise the authority asked, the court will so do. If it appears that the petitioner has an adequate remedy at law, either by action or by way of a full, plain, and perfect defense, and no reason is shown why a resort to equity is necessary, expedient, or proper, and there is no danger of indefinite delay, the court may refuse to entertain jurisdiction. As a general rule, insurance contracts stand upon the same footing as other contracts, with respect to interference by a court of equity. If the contract is obtained by fraud or deception, or by false and fraudulent misrepresentations, or the relief sought rests upon accident or mistake, equity will take cognizance and grant relief; so also will jurisdiction be entertained if the party has no adequate remedy at law. But the fact that the plaintiff has an adequate remedy at law does not of necessity preclude a resort to equity, nor does it follow that for such reason a court of equity will refuse to entertain jurisdiction. If the special circumstances would render it inequitable, unjust, or a hardship to compel the plaintiff to await a suit at law at the instance of the other party, the court will exercise its power, or if the court has obtained jurisdiction for one purpose, it may retain it for all purposes, even though circumstances have arisen which would give an adequate remedy at law, and the same are set forth in the case by supplemental bill.[151]

[151] Home Ins. Co. v. Stanchfield, 2 Abb. (C. C.) 6; 1 Dill. (C. C.) 424, per Dillon and Miller, JJ.; McEvers v. Lawrence, Hoffm. 172; Tayloe v. Merchants' Ins. Co., 9 How. (U. S.) 390; North American Ins. Co. v. Whipple, 2 Biss. (C. C.) 418; Franklin Ins. Co. v. McCrea, 4 G. Greene, 229; Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 205; 48 How. Pr. (N. Y.) 502; Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatchf. (C. C.) 142; Ocean Ins. Co. v. Fields, 2 Story (C. C.), 59; Gerrish v. German Ins. Co., 55 N. H. 355; American Ins. Co. v. Barnett, 73 Mo. 364; 39 Am. Rep. 517; Ingersoll v. Missouri Valley L. Ins. Co., 37 Fed. Rep. 530; Thornton v. Knight, 16 Sim. 509; French v. Conolly, 2 Anstr. 454; Prince of Wales Assur. Co. v. Palmer, 25 Beav. 605; Union Central L. Ins. Co. v. Poetker, 33 Ohio St. 459; 31 Am. Rep. 555. As to the rule in contracts generally that equity will retain jurisdiction and grant final relief if jurisdiction has once attached, see Currie v. Clark (N. C.), 7 S. E. Rep. 776; Towns v. Smith, 115 Ind. 480; 16 N. E. Rep. 811.

§ 1675. When Equity will Rescind or Cancel—Cases. Equity will take cognizance of a bill by policy-holders of a life insurance company to compel the termination of their contracts and decree the payment of the present value of their policies, where the company's corporate existence is only for the purpose of winding up its affairs and its premium receipts do not pay expenses, the company having transacted no new business for several years.[152] If the policy is conditioned to become void if the assured should become so far intemperate as to impair his health, equity will not decree that the policy be delivered up to be canceled.[153] If the policy be obtained by fraud, or by misrepresentation or concealment amounting to fraud, equity will order a cancellation upon a suit brought before loss or death, and, in certain cases, even after loss or death. Thus, where the insured misrepresented and concealed facts concerning his health which materially affected the risk, it was canceled, even though the policy had been assigned.[154] So it is held that cancellation will be decreed for want of insurable interest,[155] or for concealment in marine risks of material facts.[156]

§ 1676. When Equity will not Rescind or Cancel—Cases.—Although fraud and concealment are alleged in a bill for cancellation of the policy, and the court has jurisdiction, it may refuse relief where its interference would withdraw the case from a court of law wherein the plaintiff has, upon the case made by the bill, a full and perfect defense.[157] Equity will not decree the cancellation of a policy after a loss has occurred, and enjoin the assured from bringing any action thereon, where the facts upon which the bill is based, although

[152] Ingersoll v. Missouri Val. L. Ins. Co., 37 Fed. Rep. 530.

[153] Connecticut Mut. L. Ins. Co. v. Bear, 26 Fed. Rep. 582. Contra, Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatchf. (C. C.) 142.

[154] British Equitable Assur. Co. v. Great Western Ry. Co., 20 L. T., N. S., 422; Hancock v. McNamara, 2 Irish Eq. 486.

[155] Goddard v. Garrett, 2 Vern. 269.

[156] London Assur. Co. v. Mansel, 3 Younge & C. 216; De Costa v. Scaudret, 2 P. Wms. 170.

[157] Hoare v. Bremridge, 8 L. R. Ch. 22; 42 L. J. Ch. 1. See Marine Ins. Co. v. Hodgson, 7 Cranch (U. S.), 332.

alleging fraud in obtaining the policy, could, if true, be fully availed of as a defense in an action at law, and no such cause as indefinite delay or that equitable relief is necessary or expedient is set up, and no suggestion of any obstacle to making a defense at law.[158] Nor will relief be granted simply on the ground of unseaworthiness of the ship and deviation, no case of fraud being made out upon the bill.[159] And equity will not decree that a policy is void for breach of condition against the premises being vacant, where there is no evidence to show that the loss would not have occurred exactly as it did had it been occupied.[160] Nor will the court order the policy canceled nor an action at law enjoined upon the allegation of fraud in the assignor in effecting the policy, the matter set up in the bill being a good defense in the action at law.[161]

§ **1677. Equity may Rescind Cancellation made by Mistake.**—If a cancellation of a marine risk is made by mutual mistake after a loss, and in ignorance thereof, by both parties, equity will rescind the cancellation, though said cancellation was in consideration of a returned proportionate premium.[162] Although this rule is based upon a case in the lower courts, the principle underlying the decision is that which obtains in numerous cases where relief has been granted by equity.

§ **1678. Where Equity will Refuse to Cancel after Loss or Death.** — The fact whether the suit to cancel has been brought before or after loss has been declared by high authority to be a turning point in determining whether equity would entertain jurisdiction, it being declared that although in the case presented, the action being brought after loss, jurisdiction would not be entertained, yet if such a bill had been brought before loss, or in case of a life policy

[158] Home Ins. Co. v. Stanchfield, 1 Dill. (C. C.) 424; 2 Abb. (C. C.) 1.
[159] Thornton v. Knight, 16 Sim. 509.
[160] Traders' Ins. Co. v. Race, 142 Ill. 338; 31 N. E. Rep. 392.
[161] Scottish Amicable L. Assur. Soc. v. Fuller, 2 Irish Eq. 53. See Carter v. United Ins. Co., 1 Johns. Ch. (N. Y.) 463.
[162] Duncan v. New York Mut. Ins. Co., 46 N. Y. St. Rep. 241.

before death, there would be a strong inclination to sustain the bill.[163] And although the intention of the insured to destroy the property by fire will justify an immemediate cancellation before loss, yet if the company seeks to rescind in equity after the loss, the court will refuse to entertain the bill, and the remedy must be at law if the assured consummates his intention to burn the property.[164] And although the bill alleged fraudulent representations and concealment, but there was no averment of an intended assignment, and the obligation to pay had become fixed by the death of the party, and the matter had become purely one of an adequate remedy at law, the court refused to entertain the bill.[165]

§ 1679. When Equity will Cancel after Loss or Death. Notwithstanding the decisions noted under the last section, there are numerous cases wherein equity has entertained jurisdiction and decreed cancellation of the policy, even upon a bill filed after loss or death, upon a proper case made under the bill. Thus, it is held that even after the loss has been adjusted and payment promised equity will order the policy canceled and the promise to pay rescinded, upon the ground that the insured has misrepresented his title to the property, by means

[163] Home Ins. Co. v. Stanchfield, 2 Abb. (C. C.) 6; 1 Dill. (C. C.) 424, per Miller, J. In this case there was a limitation in the policy as to the time of bringing suit, and it was alleged that the defendants were threatening to sue at law, and there was therefore no danger of indefinite delay, and the company would have a full, plain, and perfect defense at law; and generally, by the occurrence of the loss a suit at law arises to which the company may interpose a defense, the facts presented by its case upon the bill, and this test, whether the suit is brought before or after loss, has been held the turning point in other cases, the suit not being sustained where filed after loss. See Globe Ins. Co. v. Reals, 79 N. Y. 205; 50 How. Pr. (N. Y.) 237; Phœnix Ins. Co. v. Bailey, 13 Wall. (U. S.) 616; Fowler v. Palmer, 62 N. Y. 533; Hoare v. Brembridge, L. R. 8 Ch. App. 22; Town of Venice v. Woodruff, 62 N. Y. 462; Imperial F. Ins. Co. v. Gunning, 81 Ill. 236.

[164] Imperial F. Ins. Co. v. Gunning, 81 Ill. 236.

[165] Insurance Co. v. Bailey, 13 Wall. (U. S.) 616; citing Hupp v. Babin, 19 How. (U. S.) 271; Parker v. Lake Co., 2 Black (C. C.), 545; Boyce v. Grundy, 3 Pet. (U. S.) 210; Graves v. Insurance Co., 2 Cranch (U. S.), 215.

of which the policy under the contract stipulations is forfeited, it appearing that the company did not discover the facts alleged until after adjustment and its promise made.[166] So equity may cancel a policy even after a loss occurs, it appearing that the policy was by mistake issued for a longer time than was intended by either party.[167] So where one who had no interest in either ship or cargo effected a policy on the ship, which was lost before the policy expired, it was held that equity would order the policy surrendered for cancellation.[168] Again, where a marine policy was effected by the insured upon his ship, and he concealed the fact that he had heard that a ship answering the description of his vessel had been lost, a cancellation was decreed.[169] And in another case where it appeared that the policy had been obtained on the life of another by fraudulent means for a fraudulent purpose, which was consummated by the holder of the policy by the murder of the insured, it was held that equity would order the policy delivered up for cancellation.[170] This case would, however, differ from that where the policy is forfeited by the act of one who, after effecting for his own benefit insurance on the life of another, murders him to obtain the insurance, in which case the defense could be availed of at law.[171]

§ 1680. Same Subject—Conclusion.—The result of the above cases seems to be this: That if equitable interposition is sought before loss or death, the right of the plaintiff to the aid of the court is better than it would be were he to wait until after loss or death, when the question might arise whether his remedy by way of defense to an action at law on the policy would not be adequate, and when it would be necessary to show that some obstacle prevented making the defense at law. In

[166] American Ins. Co. v. Barnett, 73 Mo. 364; 39 Am. Rep. 517. See, also, North American Ins. Co. v. Whipple, 2 Biss. (C. C.) 418.

[167] North American Ins. Co. v. Whipple, 2 Biss. (C. C.) 418. See Wittingham v. Thornborough, 2 Vern. 206; Finch, 20.

[168] Goddart v. Garrett, 2 Vern. 269.

[169] De Costa v. Scaudret, 2 P. Wms. 170.

[170] Prince of Wales Assur. Co. v. Palmer, 25 Beav. 605.

[171] See New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591.

other words, having no remedy at law before loss, the case presented by a bill brought after loss would have to show, notwithstanding a then existing adequate remedy at law, that a resort to equity was necessitated by some particular circumstance of equitable cognizance warranting equitable relief, and it would seem reasonable to state, as a rule, that the fact that the loss has occurred is not conclusive, and upon a proper averment of facts showing that a resort to equity is either necessary, expedient, or proper, or that some obstacle prevents a complete defense at law, the court may, in a reasonable and proper exercise of that discretion which is generally exercised in matters of cancellation, take cognizance and grant relief. The words of Judge Dillon are, however, pertinent in this connection. Referring to the English decisions on the question of equitable cancellation, he says: "The old cases are entitled to very little respect as authority, and the modern ones tend to show that equity will not oust the law jurisdiction or interfere with the legal remedies where there is a full defense at law, and no obstacle in the way of making it." [172]

§ **1681. Proof as to Cancellation or Rescission.**— The burden of proving a rescission or cancellation of the contract is upon the party claiming that it has been thus terminated,[173] and where the statute provides that fire companies shall, upon request of the assured, cancel any policy, issued or renewal, the burden of proof is upon the company to show that the request for cancellation has been received before the fire.[174] But the insurers are bound by the specified reason assigned for the cancellation, and cannot set up another reason, nor can they assign a specific reason when a general right to rescind is

[172] Home Ins. Co. v. Stanchfield, 2 Abb. (C. C.) 6; 1 Dill. (C. C.) 424, per Dillon and Miller, JJ.; Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatchf. (C. C.) 142, per Shipman, J.; Fenn v. Craig, 3 Younge & C. 216; 11 Chip. D. 363.

[173] Runkle v. Citizens' Ins. Co. of Pittsburgh (Pa.), 6 Fed. Rep. 143; Gomila v. Hibernian Ins. Co., 40 La. Ann. 553; 4 S. Rep. 490.

[174] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608; 40 N. Y. St. Rep. 426; 28 N. E. Rep. 653; 21 Ins. L. J. 31; citing Griffey v. Insurance Co., 100 N. Y. 417; 3 N. E. Rep. 309; affirming 25 N. Y. St. Rep. 728; reversing 26 N. Y. St. Rep. 983.

claimed.[175] And where the fact as to whether there has or has not been a cancellation depends largely upon the agent's acts in reference thereto, such acts and declarations may be shown in evidence.[176] The company must prove that it has given the assured notice of cancellation where it relies upon a reservation in the policy giving it the right to cancel upon notice, etc.[177] The fact that the notice was found among the assured's papers several months after the loss is not sufficient proof of service of notice, even though coupled with the fact that a notice was prepared by the company.[178]

§ 1682. Whether Question of Rescission or Cancellation is one of Law or Fact.—The question whether there has been a cancellation may depend upon the legal construction of written communication by the court, and all transactions relating to the cancellation of a contract of insurance must be reasonably and fairly construed according to the manifest understanding of the parties at the time and within the limits of good faith; or the question may, in certain cases, rest upon the veracity of the respective parties and their witnesses as to the facts, or upon what was said or done by and between them, and thus be a question for the jury.[179] If the evidence of cancellation by mutual consent raises no real question of fact under the issue, the court need not submit it to the jury.[180] Where the policy was to lapse if the premium note was not paid when due, the question in an action for wrongfully canceling the policy as to what was a reasonable time within which the plaintiff might notify the company of acceptance of the cancellation, is a question of law for the courts.[181] What is

[175] Cahill v. Andes Ins. Co., 5 Biss. (C. C.) 211.

[176] Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112; 51 N. W. Rep. 188.

[177] Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 143.

[178] Lattan v. Royal Ins. Co., 45 N. J. 453.

[179] Ionides v. Hartford, 29 L. J. Ex. 36; Bingham v. Insurance Co. of North America, 74 Wis. 498; 43 N. W. Rep. 494; Barnes v. Woodfall, 6 Com. B., N. S., 657; 28 L. J. Com. P. 338; Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112; 51 N. W. Rep. 200.

[180] Candee v. Citizens' Ins. Co., 4 Fed. Rep. 143; citing Pleasants v. Faut, 22 Wall. (U. S.) 116; Commissioners v. Clark, 94 U. S. 278.

[181] Willmot v. Charter Oak L. Ins. Co., 46 Conn. 483.

a reasonable notice of cancellation is a question for the jury, where the fact is controverted whether there was a sufficient time for a survey required by the company and reinsurance after notice and before the fire.[182]

[182] Chadbourne v. German-American Ins. Co., 31 Fed. Rep. 533.

TITLE VIII.

SUBJECT OF INSURANCE.

(1695)

TITLE VIII.

SUBJECT OF INSURANCE.

CHAPTER XL.

DESCRIPTION OF PARTIES AND SUBJECT MATTER.

§ 1689. Description of parties.
§ 1690. Description of the property—General rules.
§ 1691. Extent of interest need not be specifically described.
§ 1692. Same subject: Carriers: Shipowner: Consignee: Undivided interest: Assignee.
§ 1693. Same subject: Joint owners: Partners.
§ 1694. Same subject: Trustee: Tenant by curtesy: Administrator: Executor: Agent: Charterer.
§ 1695. Same subject: Mortgagor and mortgagee: Reinsurer.
§ 1696. Goods shipped by carriers: Owner's interest covered.
§ 1697. Specific description, how far exclusive: The terms "including" and "consisting of."
§ 1698. When specific designation of interest or property is required.

§ 1689. Description of Parties.[1]—In this country it is usual to insert in the policy the names of the parties.[2] In marine policies the parties intended to be benefited may be covered by descriptive words. There may be a nominal insured, and the party actually interested be covered by the words "whom it may concern," or words of like import. Fire policies may also be effected "for whom it may concern," or equivalent words. In England, policies in blank are prohibited; as construed by the courts, the statute renders it necessary that the name of the person actually procuring the policy to be effected be inserted, and in practice the name usually inserted is that of the insurance broker, and while such policies are usually effected by such broker in his name and on his own account, or

[1] See secs. 310, 311, herein.
[2] But see Weed v. London etc. Ins. Co. (N. Y.), 22 N. E. Rep. 231.

in his name and on the principal's account, neither the law nor practice preclude a change as to the descriptive words used. Mr. Maclachlan says a policy in blank "is either prohibited by the laws or rejected by the practice of all mercantile states." Mr. Duer, however, is of the opinion that the prohibitory act of England evidences that such policies were valid at the common law, and that in this country, unless the law has been superseded by an appropriate usage in the absence of a statute, they are valid, even though in blank. But the question would, however, hardly arise under the practice of the present day,[3]

[3] Clinton v. Hope Ins. Co., 51 Md. 647; F. I. Co. v. M. & M. T. Co., 66 Md. 339; 1 Phillips on Insurance, 3d ed., p. 26, sec. 28; Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 7, p. 46; c. v, secs. 1-6, pp. 106-14; c. xi, sec. 4, p. 262, et seq.; 1 Arnould on Marine Insurance, Perkins' ed. 1850, pp. 22, *23, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 231-35; 1 Duer on Marine Insurance, ed. 1845, pp. 11-20, secs. 10-17; Richards on Insurance, ed. 1892, 220, sec. 200. The Massachusetts standard form of fire policy provides for the insertion of "the corporate name of the company or association, and its principal place or places of business": Pub. Stats. Mass., pp. 713-15. The English form of marine policy is given by Mr. Maclachlan under the pages above referred to in this note. See, also, 35 Geo. III, c. 63; 30 Vict., c. 23, where it is printed in the schedule. Both this writer and Mr. Arnould give the mode of filling up said blank as to insertion of the names of the assured or the agent: See above reference. The first statute was passed in 1785 (25 Geo. III, c. 44), and provided that if the insured resided in Great Britain, his name, or that of his agent, should be inserted in the policy as the person interested, and when he resided abroad the name of his agent should be inserted. This act was repealed by 28 Geo. III, c. 56, which provided that "it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy or policies of assurance upon any ship or ships, vessel, or vessels, or upon any goods, merchandises, effects, or other properties whatsoever, without first inserting, or causing to be inserted, in such policy or policies of assurance, the name or names, or the usual style and firm of dealing of one or more of the persons interested in such assurance, or without, instead thereof, first inserting, or causing to be inserted, in such policy or policies of assurance, the name or names, or the usual style and firm of dealing of the consignor or consignors, consignee or consignees, of the goods, merchandises, effects, or property so to be insured; or the name or names, or the usual style and firm of dealing of the person or persons residing in Great Britain who shall receive the order for and effect such policy or policies of assurance, or of the person or persons who shall give the order or direction to the agent or agents immediately

although it is declared that a "policy in the name of A" for ——— covers "whom it may concern," where it appears that the blank was intended to be filled.[4] The phrase "whom it may concern" is a technical one, and means those whose interests were intended to be covered, even though foreigners, and not everybody who may have an interest.[5] Bodies politic and corporate may be included under the designation of "person or persons" in the policy.[6]

§ 1690. Description of the Property—General Rule. The policy should designate the property, so that the subject insured and at risk may be determined. In describing the property intended to be covered it should be so clearly set forth in the policy, that the obligation concerning the same embodied in the contract is certain of ascertainment, either from the specific terms themselves or by relation; or some means of determining to what the contract is to be applied, should be prescribed. This rule does not, however, preclude resort to extrinsic evidence in such cases where by usage, ambiguity, or use of technical words, or otherwise, such evidence is rendered admissible. Care should also be taken in describing the subject of insurance to use such words as that neither party shall have it in his power to render the contract inoperative, or to

employed to negotiate or effect such policy or policies of assurance." This act makes null and void all policies underwritten contrary to its "true intent and meaning." For cases construing the act 25 Geo. III, c. 44, see Cox v. Parry, 1 Term. Rep. 464; Pray v. Edie, 1 Term. Rep. 313; Woolff v. Horncastle, 1 Bos. & P. 321, per Buller, J. For cases construing the act 28 Geo. III, c. 56, see Woolff v. Horncastle, 1 Bos. & P. 316; Beel v. Gilson, 1 Bos. & P. 345; De Vignier v. Swanson, 1 Bos. & P. 346, n.; Hibbert v. Martin, 1 Camp. 538; Routh v. Thompson, 13 East, 274; Lucena v. Crawford, 1 Taunt. 325; 3 Bos. & P. N. R. 269; Bell v. Janson, 1 Maule & S. 202; Dickson v. Lodge, 1 Stark. 180; Hagerdorn v. Oliverson, 2 Maule & S. 479; Palmer v. Marshall, 8 Bing. 79. The construction of these statutes is also considered in 1 Arnould on Marine Insurance, Perkins' ed. 1850, pp. 165-71, *164-70; 1 Duer on Marine Insurance, ed. 1845, pp. 11-18, secs. 10-16; 1 Marshall on Insurance, ed. 1810, *306-12 a.

[4] Turner v. Burrows, 8 Wend. (N. Y.) 144, per Walworth, Ch.

[5] Newton v. Douglass, 7 Har. & J. (Md.) 450; Seamans v. Loring, 1 Mason (C. C.), 127, per Story, J.

[6] United States v. Amedy, 11 Wheat. (U. S.) 392.

enlarge or diminish its provisions according as his personal interest may dictate. This may best be accomplished by reliance upon the adjudicated cases in point, and upon well-ascertained general principles applicable thereto.[7] The description should sufficiently designate the property. A subscription to a printed form of marine policy wherein the ship is not named, nor the specific subject of insurance set forth, nor any value declared, nor any sum mentioned, is not a policy on which the underwriter is liable, although the description of the goods is thereafter inserted.[8] In cases of doubt as to what property is covered, the construction will be against the insurer.[9] It is a controlling presumption that polices of insurance have reference to the character and use of the insured property, and to the incidents and usages of that particular risk, and contemplate its use by the owner in the ordinary manner and for the purposes to which such use is ordinarily applied, unless the laws and usage of the policy is such as to exclude such presumption.[10] If a vessel or goods are insured, that vessel or those goods are covered which compare most accurately to the description.[11] Property which would reasonably be included in the description is covered, and if the insurers intend otherwise, it should be excluded by proper terms, or they should insist upon a representation as to the character of the property or some warranty in regard to it which would prevent the policy attaching.[12] Reference may be had to the bill of lading to identify the goods and determine the right of the assured to receive them.[13] And in a fire policy the reference to the plan must be regarded as identifying the build-

[7] See Emerigon on Insurance, Meredith's ed. 1850, c. x, p. 233, c. ii, sec. 7, p. 46. See chapter herein on evidence, and c. ix, herein.

[8] Langhorne v. Cologan, 4 Taunt. 330.

[9] Planters' Ins. Co. v. Engle, 52 Md. 468; Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350. See c. viii, herein.

[10] See Holbrook v. St. Paul F. & M. Ins. Co., 24 Minn. 229, per the court; Macy v. Whaling Ins. Co., 9 Met. (Mass.) 354; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19.

[11] Sea Ins. Co. v. Fowler, 21 Wend. (N. Y.) 600.

[12] Baltimore Ins. Co. v. Taylor, 3 Har. & J. (Md.) 198. But see Richardson v. Home Ins. Co. (47 N. Y. Super. Ct.), 15 Jones & S. 138.

[13] Ballard v. Merchants' Ins. Co., 9 La. (O. S.) 258.

ing.[14] And in fact the voyage or time of shipment not only go to the question of attachment of the risk, but also serve to identify the goods covered, and this is especially true of insurances on goods, etc., by ship or ships.[15] Although separate forms of marine insurance are provided in this country for ship and cargo,[16] the English form of marine policy covering the subject insured is upon "any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship and vessel called the ———." This is applicable to insurances on both ship and cargo, but it is written in the body or otherwise to cover the subject intended to be insured, to which alone it then becomes applicable, for the written words control the printed ones so far as they are a part of the policy.[17]

§ 1691. Extent of Interest Need not be Specifically Described.—It is not necessary, as a general rule, that the extent of the insured's interest be specifically set forth in the policy. One who holds an undivided interest need not specifically describe his share or proportion of interest in the policy, but may effect insurance thereon in general terms. If it appears that the description was intended to cover and apply exclusively to the individual interest of the assured, he will recover for such interest as he has.[18] Such exceptions as exist

[14] Fair v. Manhattan Ins. Co., 112 Mass. 320.

[15] Crowley v. Cohen, 3 Barn. & Adol. 478; Lorbe v. Merchants' Ins. Co., 6 La. 185. See Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302.

[16] It is the practice in this coutry to insure ship and freight under the same policy.

[17] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 28, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 237-39; citing Robertson v. French, 4 East, 141, per Lord Ellenborough; Robinson v. Tobin, 1 Stark. 333; Houghton v. Ewbank, 4 Camp. 89; Dudgeon v. Pembroke, 2 App. Cas. 284, 293. One form used in San Francisco being "upon his or their interest as —— in the body, machinery, tackle, apparel, and other furniture of the good —— called the ——," cargo being "upon —— valued at —— (if no overvaluation be written herein, then the property is hereby valued at invoice cost on board), laden or to be laden under deck on board the good ——."

[18] See Emerigon on Insurance, Meredith's ed. 1850, c. xi, sec. 4, p. 262, et seq.; c. x, sec. 1, p. 233; Palmer v. Pratt, 2 Bing. 192, per

to the above rule will be noted under the sections of this and the following chapter, wherein the several interests are specified, and also under the chapter on "concealment" herein.

§ 1692. Same Subject—Carriers—Shipowner—Consignee—Undivided Interest—Assignee.—The general rule above stated is applied to a carrier's interest as such in goods,[19] and to a general policy on the owner's interest in the ship without the insured specifying in the policy its character or extent;[20] likewise to a consignee's interest where he is entitled to insure by reason of a lien for advances and the like.[21] So also has the rule been held to apply where insurance was effected by the plaintiffs, who were owners of only one-third of the cargo, in their own name "as well as in the name or names," etc.; it being declared that if it appeared that if the insured had an interest in the cargo, it was sufficient, and it was not material whether it was a distinct or undivided share.[22] And an assingee for a valuable consideration of property, it being in his possession, and subject to his control, need not specifically set forth his interest, but may in general terms.[23] So where insurance was effected for the "owners of the brig," it was held that such words were merely descriptive of the persons intended to be insured; that the policy was effected for the benefit of "whom it might concern," and that extrinsic evidence was admissible to show who were intended and what their interests were.[24]

§ 1693. Same Subject—Joint Owners—Partners.—Where a policy was on goods owned jointly by N. and G., and the policy was afterward indorsed, by request of insured, "loss,

Park, J.; Carruthers v. Shedden, 6 Taunt. 114; Crowley v. Cohen, 3 Barn. & Adol. 478, per Lord Tenterden; Glover v. Black, 1 W. Black. 423; Cal. Civ. Code, secs. 2591, 2592.

[19] Crowley v. Cohen, 3 Barn. & Adol. 478.

[20] Kenney v. Clarkson, 1 Johns. (N. Y.) 385; Irving v. Richardson, 2 Barn. & Adol. 293; 1 Moody & R. 153.

[21] Carruthers v. Shedden, 6 Taunt. 14. Contra, Tappan v. Atkinson, 2 Mass. 365.

[22] Lawrence v. Van Horn, 1 Caines (N. Y.), 276.

[23] Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

[24] Foster v. United States Ins. Co., 11 Pick. (Mass.) 85; Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561; affirmed, 4 Wend. (N. Y.) 75; 1

if any, payable to G., as his interest may appear," it was held that the intent was to insure the joint property of the parties, and should be so construed.[25] So it is held that if an acting partner effects insurance on his own account by his individual name and of "whomsoever else it may concern," it is an insurance on joint account if it is shown that such was the intention of the insured, and if the moiety of the other partner was acquitted and that of the named partner condemned, the recovery must be of a moiety of a sum insured.[26] So goods owned jointly but insured in the name of one covers the interest of both, it appearing that the agent informed the assured that it would make no difference whether the insurance were effected in the name of one or both.[27] One of several part owners may insure freight generally without specifying what share he has in the ship.[28] A case in the United Statessupreme court decides that a policy in the name of one partner without the general clause "as well for the persons named in the policy as for the benefit of all concerned," does not cover the interest of copartners not named.[29] In a New York case, under a policy to one to cover the interest of himself and another, it was held that the interest of a third person was not covered by the policy, although its terms might seem to include him.[30] Where one of two equal owners effects a policy in his own name, the other's interest is not covered, nor is the insured liable to the other

Paine (C. C.), 615; Finney v. Warren Ins. Co., 1 Met. (Mass.) 16. See Routh v. Thompson, 11 East, 428; De Bolte v. Pennsylvania Ins. Co., 4 Whart. (Pa.) 68.

[25] Pitney v. Glen's Falls Ins. Co., 61 Barb. (N. Y.) 335. See Solmes v. Rutgers F. Ins. Co., 42 N. Y. (3 Keyes) 416.

[26] Lawrence v. Sebor, 2 Caines (N. Y.), 203. See Deering's Annot. Civ. Code Cal., sec. 2590; Bailey v. Hope Ins. Co., 56 Me. 474; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, p. 240.

[27] Manhattan Ins. Co. v. Webster, 59 Pa. St. 227.

[28] Rising v. Burnett, reported in 2 Marshall on Insurance, ed. 1810, *730.

[29] Graves v. Boston M. Ins. Co., 2 Cranch (U. S.), 419, per Marshall, C. J.; Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130. See Pearson v. Lord, 6 Mass. 81.

[30] Pacific Ins. Co. v. Catlett, 4 Wend. (N. Y.) 75; affirming 1 Wend. (N. Y.) 561. See Id., 1 Payne (C. C.), 615. See opinions of Walworth, Ch., and Thompson, J.

joint owner for any portion of the insurance money.[31] If the evidence does not show an intention to cover the interest of any other person, the recovery will be limited to that of insured's own interest.[32] So if one effects a policy in his own name on specie, and after the payment of the loss discovers that only a portion of the property was his, and returns the balance to the insurers, another cannot recover on the ground that his interest was intended to be covered.[33] And where parties are joint owners of a stock of goods, and one of the copartners insures the whole in his own name, it will cover only his individual interest where there is no evidence of an intent to insure for the firm's benefit.[34] Mr. Parsons says: "Whether the partner insured, in an action for the whole loss, averring in his declaration an entire interest, can upon proof of the firm ownership recover anything, and if anything whether his pro rata share only or the whole, has been variously decided," although he notes that the decision in the United States supreme court[35] "is entitled to the highest respect."[36] Mr. Phillips says the rule governs which is established by this decision.[37] So also does Mr. Duer, who considers at length the cases bearing upon the question.[38] It would seem that the following rule might be deduced from the cases: If the policy is made in the name of one person or an individual partner without general words or the words "for whom it may concern," or "as the property may appear," or it contains no words importing an interest in any other than the person named, the insurance is confined to the sole benefit of the nominal insured, and in case of a partner it makes no differ-

[31] Garrell v. Hanna, 5 Har. & J. (Md.) 412.

[32] Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302. See Holmes v. Marine Ins. Co., 2 Johns. Cas. (N. Y.) 329.

[33] Baudrey v. Union Ins. Co., 2 Wash. (C. C.) 391.

[34] Peoria F. & M. Ins. Co. v. Hall, 12 Mich. 202.

[35] Graves v. Boston M. Ins. Co., 2 Cranch. (U. S.), 419, per Marshall, C. J.

[36] Parsons on Partnership, 4th ed., 318, sec. 239.

[37] 1 Phillips on Insurance, 3d ed., 219, sec. 391. But see 2 Phillips on Insurance, 614, sec. 2021.

[38] 2 Duer on Marine Insurance, ed. 1846, pp. 25-27, sec. 22, pp. 74-83.

ence in this respect that the insurance is on the firm property.[39] An insurance "as the property may appear" covers the interest the assured has.[40]

§ 1694. Same Subject—Trustee—Tenant by Curtesy—Administrator—Executor—Agent—Charterer.—A trustee need not describe his interest where he has the title, possession, control, and management of the property, but may insure in his own name.[41] So a husband who is tenant by curtesy may insure his interest in his wife's estate without a specific description, although this might rest upon the principle of trusteeship.[42] And one who holds as administrator may insure without stating the capacity in which he holds,[43] although it was held in an English case that an executor could not recover on a policy where the testator's name was not inserted therein.[44] If one insures himself as agent generally, evidence is admissible to show whose interest was intended to be covered.[45] But an agent need not describe himself as agent,[46] although a policy effected by one as agent for a particular person covers only the interest of that person.[47] A charterer who is also a part owner need not describe the character of his interest, but may insure generally.[48]

§ 1695. Same Subject—Mortgagor and Mortgagee—Reinsurer.—A mortgagee may insure as general owner without

[39] Burgher v. Columbian Ins. Co., 17 Barb. (N. Y.) 274; Dumas v. Jones, 4 Mass. 647; Turner v. Burrows, 8 Wend. (N. Y.) 144; 5 Wend. (N. Y.) 541; Bell v. Ansley, 16 East, 141; Cohen v. Hannam, 5 Taunt. 101. Emerigon on Insurance, Meredith's ed. 1850, c. v, sec. 1, p. 107, says: "If the person effecting the insurance does not introduce the expression 'for account' he is presumed to act for himself as owner."

[40] Graves v. Boston M. Ins. Co., 2 Cranch (U. S.), 419.

[41] Stetson v. Massachusetts F. & M. Ins. Co., 4 Mass. 330. See Hibbert v. Martin, 1 Camp. 538.

[42] Franklin F. Ins. Co. v. Drake, 2 B. Mon. (Ky.) 51; Clarke v. Firemen's Ins. Co., 18 La. 431.

[43] Finney v. Warren Ins. Co., 1 Met. (Mass.) 16.

[44] Cox v. Parry, 1 Term Rep. 464.

[45] Davis v. Boardman, 12 Mass. 80.

[46] De Vignier v. Swainson, 1 Bos. & P. 346, n.

[47] Russell v. New England M. Ins. Co., 4 Mass. 32; Holmes v. United States, 2 Johns. Cas. (N. Y.) 329.

[48] Oliver v. Greene, 3 Mass. 133.

specifying the nature of his interest or disclosing the same to the insurers in the absence of a specific inquiry, although he may insure as mortgagee.[49] And where a part owner mortgaged the ship to the extent of his interest therein, and the mortgagee insured to the full amount of the mortgage, and subsequently the mortgagee, at request of the mortgagor, effected several additional insurances upon the ship generally, without specifying any particular share or interest, it was held, in an action against the mortgagee by a part owner to recover his proportionate share of the insurance, that if the jury should determine that the mortgagee knew at the time of effecting the insurance that the interests of persons other than the mortgagor were intended to be covered, the action could be sustained, the mortgagor having become bankrupt.[50] A mortgagor or mortgagee of a ship may insure under a general description,[51] although it was formerly held otherwise;[52] and although his interest is generally so expressed, the rule is that a reinsurer need not specify his interest in the policy.[53]

§ 1696. Goods Shipped by Carriers—Owner's Interest Covered.—Where a steamship company effected an open policy on goods to be shipped on its steamers, and which it might agree to insure prior to the sailing of the vessel, losses payable to it or order, and it appears from the policy, bill of lading, and evidence that other owners' goods had been covered by like insurances, and losses under the same had been paid without question, and that it was evidently intended to pro-

[49] Titus v. Glen's Falls Ins. Co., 81 N. Y. 410; Russell v. Universal Ins. Co., 4 Dall. (U. S.) 421; 1 Wash. (C. C.) 409; Buck v. Phœnix Ins. Co., 76 Me. 586; Irving v. Richardson, 2 Barn. & Adol. 193; 1 Moody & R. 153; Norwich F. Ins. Co. v. Booner, 52 Ill. 442, per Walker, J.

[50] Brink v. Douglass, 4 Mylne & C. 320.

[51] Higginson v. Dall, 13 Mass. 101; Livermore v. Newburyport Ins. Co., 3 Mass. 264; Kenney v. Clarkson, 1 Johns. (N. Y.) 385; Russell v. Union Ins. Co., 4 Dall. (U. S.) 421; 1 Wash. (C. C.) 409; Locke v. North American Ins. Co., 13 Mass. 61.

[52] Merry v. Prince, 2 Mass. 176; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 243.

[53] New York Bowery F. Ins. Co. v. New York F. Ins. Co., 17 Wend. (N. Y.) 359. See Mackenzie v. Whitworth, 1 Exch. Div. 36; L. R. 18 Exch. 142.

tect the general ownership of the plaintiff and not merely the steamship company's interest as carriers, the owner's interest will be protected.[54]

§ **1697. Specific Description, How far Exclusive—The Terms "Including" and "Consisting of."**—If the property intended to be insured is specifically described, the kind and character of goods being designated, such description operates to exclude goods not within the description; or if there be a general description, and the policy or the application, which is made a part thereof by express reference or otherwise, contains other clauses or terms showing clearly that it was intended to limit the general words used to a particular class or kind of property, the policy will be so construed; or in other words, although the courts are inclined in cases of doubt toward a liberal construction in favor of the assured, yet they will not go beyond what is manifestly and clearly the intent of the parties as evidenced by the language chosen to describe the property insured. A distinction has been frequently made between the words "including" and "consisting of" following a general description, the former being held not a word of limitation, but otherwise as to the latter; especially so when other words of the contract clearly warrant such a construction. In case, therefore, the goods are specifically described, care should be taken that the description be accurate, and include the articles intended to be covered. These general principles are alike applicable to marine and fire risks, and their application will be noted in the cases cited under this section. In this connection we will also consider many of the articles mentioned in what is known as "memorandum articles," and which, being of a more or less perishable nature, are made the subject of special stipulations governing the liability of the insurers therein.[55] If the goods insured are specifically described in marine policies, and are not loaded on board ship, they are not protected, nor does it avail the assured that goods of equal value are

[54] Insurance Co. v. Forcheimer, 86 Ala. 541; 5 So. Rep. 870.

[55] The effect of the memorandum clause and stipulations therein will be considered under another section.

shipped. Thus Emerigon says: "If in the policy the subject has been specified on which insurance was intended, and it has not been placed on board, the insurance would be null, though the person should have for his account other goods on board the ship." [56]

§ 1698. When Specific Designation of Interest or Property is Required.—The general rule is that the policy must specify the subject matter, whether it be goods, ship, freight, or whatever its character, and although this rule has been applied to marine risks,[57] it is equally applicable to property covered by other risks. By long and well-ascertained usage, especially in marine policies, certain descriptive words have come to have an ascertained and certain meaning, so that general terms will frequently include what might not otherwise be covered. There are, however, certain interests and property which are not covered by general words, but which must be specifically designated in the policy; such as those special interests which, owing to their peculiar nature, are in reality the subject matter of the contract, and which may materially affect, alter, or increase the risk.[58] These different interests or properties will, however, be noted under the following chapter, which are so far as possible, reference being had to the character and kinds of interest, arranged alphabetically.[59]

[56] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, p. 234; 1 Marshall on Insurance, ed. 1810, *316.

[57] 1 Marshall on Insurance, ed. 1810, 316; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 28, sec. 22; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 237.

[58] See Mackenzie v. Whitworth, 1 Ex. Div. 36, per Blackburn, J.; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 242.

[59] *Particular Words and Phrases.*—A policy on *American, English, and West Indian goods* will not cover goods belonging to any of the specified classes: Hutchins v. People's Mut. F. Ins. Co., 7 La. Ann. 244. A policy upon a two-story brick *building and "additions thereto"* will include a building, part of which was occupied by the servants of the assured, and one room of which was used as a laundry, though this building was not annexed to the main building, it appearing that there were no other buildings in the assured's yard which could be claimed to be an addition, and not built in the main building originally as a part thereof: Phœnix Ins. Co. v. Martin, 16 S. Rep. 417; 24 Ins. L. J. 319. Whether "*bundles*

of rods" are "bar iron" within a stipulation against partial loss on certain enumerated articles, "unless the same shall amount to twenty per cent on the whole aggregate value," is not a question for the court, but one for the jury: Evans v. Commercial etc. Ins. Co., 6 R. I. 47. *Cattle* includes hogs: Decatur Bank v. St. Louis Bank, 21 Wall. (U. S.) 294. An insurance upon the "*contents*" in a granary, or on "*stocks*" on the farm does not cover grain stored in buildings other than the granary: Benton v. Farmers' M. F. Ins. Co., 60 N. W. Rep. 691; 24 Ins. L. J. 34; 26 L. R. Annot. 237; 39 Cent. L. J. 502. Nor does an insurance upon a frame building and its "*contents*" cover property which is removed from such building to a new building: Benton v. Farmers' M. F. Ins. Co., 60 N. W. Rep. 691; 24 Ins. L. J. 24; 26 L. R. Annot. 237. *Corn*, in the memorandum, includes malt (Moody v. Surridge, 2 Esp. 333), peas, and generally every sort of grain (Mason v. Skurry, reported 1 Marshall on Insurance, ed. 1810, *226), but does not include rice: Scott v. Bourdillon, 2 Bos. & P. N. R. 213. *Counters, shelves, and drawers* are covered by a policy on the building, if so connected therewith that they cannot be taken away without injury to the building: Capital City Ins. Co. v. Caldwell, 95 Ala. 77; 10 S. Rep. 355. A policy on stock in trade, *consisting of corn, seed, hay, show fixtures*, and utensils in business, does not include hops and matting, even though the same usually constitute a part of the stock of that particular trade: Joel v Harvey, 5 W. R. 488. *Cotton in bales* may by usage mean pressed bales: Taylor v. Briggs, 2 Car. & P. 525. A fire policy on the *estate of O.* covers property left by O. to trustees for the benefit of creditors: Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394; 31 N. E. Rep. 231; 45 N. Y. St. Rep. 105; 21 Ins. L. J. 577; Weed v. Fire Assn. o Phila., 69 Hun (N. Y.), 621: 42 N. Y. St. Rep. 477; 17 N. Y. Supp. 206. *Family groceries, etc.*, does not ordinarily include *fireworks:* Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366. A haypress used upon a farm is within the meaning of the term "*farming utensils*" as used in a fire policy, but where the policy is upon "reapers, mowers, harvesters, and other farming utensils, wagons, buggies, and harness in buildings on said premises," it is held that a haypress in a stockyard at a distance from a building i not covered by the description: Phœnix Ins. Co. v. Stewart, 53 Ill. App. 273. A privilege of keeping *firecrackers* does not include *fireworks:* Steinbach v. Insurance Co., 13 Wall. 183. A policy upon all *fixtures and gas meters* placed, or to be placed, in buildings, *etc.*, of subscribers, does not limit the insurance to the property placed when the policy was issued, but covers all such fixtures and meters to the amount of the insurance whether placed before or after the date of the policy: The New York Gas Light Co. v. The Mechanics' Fire Ins. Co., 2 Hall (N. Y.), 108. *Fixtures* in a shoe factory are not covered by the term *store fixtures:* Thurston v. Union Ins. Co., 17 Fed. Rep. 127. Under a policy containing an exception of "store furniture and fixtures," shelving in the store and an office inclosed with railings in one corner are *store fixtures* within the exception: Connecticut Fire Ins. Co. v. Allen, 80 Ala. 571. So evidence is admissible that *store fixtures* cover by usage all furniture and other articles in a shop necessary or convenient for use in the course of trade: Whitmarsh v. Conway Fire Ins. Co., 16 Gray (82 Mass.) 359.,

Fixtures do not include furniture and movables: Holmes v. Charlestown Mut. Ins. Co., 10 Met. (Mass.) 211. *Dried fish* does not include pickled fish: Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289. *Fruit* in the memorandum covers dried prunes: De Pau v. Jones, 1 Brev. 437. *Furs* may be shown to be not perishable in their nature, and evidence is also admissible to show that the term *fur* includes skins chiefly valuable for their fur: Astor v. Union Ins. Co., 7 Car. 202 (see *hides* and *skins*). *Giant powder* is held to be excluded by a stipulation excluding *nitro-glycerine*, on the ground that the latter is the basis of the former, a decision which should at least be the subject of adverse criticism: Sperry v. Springfield Fire & M. Ins. Co., 26 Fed. Rep. 234; 15 Ins. L. J. 270. *Grain in stack* covers flax in stack raised solely for seed: Hewitt v. Watertown Fire Ins. Co., 55 Iowa, 623; 39 Am. Rep. 174. In another case, the policy was in stock in trade, *consisting of* grain, *guano*, and salt. At the time the insurance was effected, the assured had fertilizers on hand, but no guano, and it was held that the word *guano* embraced fertilizers: Planters' Mut. Ins. Co. v. Eagle, 52 Md. 468, one judge dissenting. Whether *groceries* includes alcohol and spirituous liquors is a question of fact for the jury, where there is evidence that they formed a part of the stock insured, and that the insurer knew of such fact: Niagara etc. Ins. Co. v. De Graff, 12 Mich. 124. An exclusion of *gunpowder* is not an exclusion of *fireworks:* Tischler v. California Farmers' Mut. F. Ins. Co., 66 Cal. 178. A policy on a stock of *hair, wrought, raw, and in process*, does not cover other goods, even though they are such as is usually kept in stores of the class insured: Medina v. Builders' Ins. Co., 120 Mass. 225. The term *hazardous* goods does not embrace *extrahazardous* or *specially hazardous* goods: Pindar v. Continental Ins. Co., 38 N. Y. 364; 97 Am. Dec. 795. *Hides and skins* covers deerskins: Bakewell v. United Ins. Co., 2 Johns. Cas. (N. Y.) 246 (see *furs.*) An insurance upon goods held "*in trust*" covers goods held by an agent employed to manage a store and who carries on business in his own name, but who is obliged to account to his principal for the profits, whenever called upon so to do by the principal, and who is obliged to turn over to the latter at the end of his employment all property in his possession: Roberts v. Fireman's Ins. Co., 165 Pa. St. 55; 30 Atl. Rep. 450; 44 Am. St. Rep. 642. See, as to "*in trust*," Hough v. People's Ins. Co., 36 Md. 398. *Iron* covers steel: Hart v. Standard M. Ins. Co., 22 Q. B. D. 499. A policy on *jewelry and clothing*, being *stock in trade*, does not include musical or surgical instruments, guns, pistols, etc., since the words "stock in trade" are limited by the antecedent words, "jewelry and clothing": Rafael v. Nashville M. & F. Ins. Co., 7 La. Ann. 244. *Linen* does not cover linen drapery when from the context household linen or apparel is meant: Watehorn v. Langford, 3 Camp. 422. *Machinery* which is constructed for and used in a flourmill is held to be *real property* within the meaning of a statute: Havens v. Germania F. Ins. Co., 27 S. W. Rep. 718; 26 L. R. Annot. 107. The term "*perishable articles*" does not include *pickled fish* (Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289); and it may be shown not to include deerskins (Bakewell v. United Ins. Co., 2 Johns. Cas. (N. Y.) 246); nor flour (Nelson v. Louisiana Ins. Co., 17 Mart. (La.) 289); nor furs (Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202.) *Piece*

goods does not cover hats: Hunter v. Prinsep, 10 East, 378; 1 Marshall on Insurance, ed. 1810, *316. *Plate* does not include silver forks, tea or tablespoons, under a clause excluding *plate, etc.*, unless particularly specified: Hanover F. Ins. Co. v. Mannasson, 29 Mich. 316. Neither *premises*, nor *premises and building*, apply to personalty: Carr v. Roger Williams' Ins. Co., 60 N. H. 513; Morely v. Vermont Mut. F. Ins. Co., 55 Vt. 142. A policy of insurance upon goods, locating the premises and describing the property as "being situated on or *confined to premises* actually occupied by the assured," and the application being for insurance upon the goods "while on the *premises only*," will not cover a loss upon such goods while on premises twenty miles distant: Lakings v. Phenix Ins. Co. (Iowa, 1895), 62 N. W. Rep. 783; 24 Ins. L. J. 545; 28 L. R. Annot. 70; and see note to 26 L. R. Annot. 237. *Private stock* "contained in" a certain building may, under a policy to stockholders, be shown to mean capital stock: Warren v. Davenport F. Ins. Co., 31 Iowa, 464. *Refined oil* does not include lard oil: Weisinger v. Harmony Ins. Co., 56 Pa. St. 442. If an accident policy provides that it does not cover accidents on a "railroad bridge, trestle, or *roadbed*," the word "roadbed" will not include a space of ten feet between railroad tracks: Meadows v. Pacific M. L. Ins. Co. (Mo., 1895), 31 S. W. Rep. 578; 24 Ins. L. J. 721. Nor does it include the ends of ties of such unusual lengths that a person standing or sitting thereon would be beyond the reach of passing trains: Standard Life & Accident Assn. v. Langsdon, 60 Ark. 381; 30 S. W. Rep. 427. The word "*roadbed*," as used in an accident policy, does not mean the entire space included in the company's right of way, but only refers to that part of the right of way which is occupied by the ties and rails: Meadows v. Pacific M. L. Ins. Co. (Mo. 1895), 31 S. W. Rep. 578; 24 Ins. L. J. 721. *Roots* in the memorandum covers pink-root, and usage is admissible to show the meaning of the word roots: Klett v. Delaware Ins. Co., 23 Pa. St. 262. It may also be shown that the term is confined in such case to perishable articles, and, therefore, does not cover sarsaparilla: Coit v. Commercial Ins. Co., 7 Johns. (N. Y.) 385. Under an insurance on their *stock of watches, watch trimmings, etc.*, the word *stock* is held not limited by the following words, but covers the assured's *general stock*, a case not in accord with the authorities above noticed: Crosby v. Franklin Ins. Co., 5 Gray (Mass.), 504. An insurance on a *stock of eggs in pickle* covers eggs which are a part of the stock, though not in pickle, where the agent testified that it was intended to insure the entire stock while being pickled and disposed of: Hall v. Concordia Fire Ins. Co., 90 Mich. 403; 51 N. W. Rep. 524. So the words *stock in trade*, or like words, may cover fireworks when they are shown to be usually kept in a stock of the class insured: Barnum v. Merchants' F. Ins. Co., 97 N. Y. 188. An insurance on a *stock of ship timber, including* specified goods, may cover other than those specified: Webb v. National F. Ins. Co., 2 Sandf. (N.Y.) 497. *Tools* of a flourmill does not cover paper bags: Hutchinson v. Niagara etc. Ins. Co., 39 U. C. Q. B. 483. *Tools* used in the manufacture of boots and shoes cover shoe patterns: Adams v. New York Bowery Fire Ins. Co. (Iowa, 1892), 51 N. W. Rep. 1149. So patterns for iron castings, used by the hands of a single person, are "*tools*," within a policy insuring

against fire. "Fixed and movable machinery, engine, lathes, and tools" of a manufacturer of machinery, are not within an exception of "jewels, plate, watches, ornaments, medals, patterns, printed music," etc: Lovewell v. Westchester Fire Ins. Co., 124 Mass. 418; 26 Am. Rep. 671. *Wearing apparel* does not cover linen sheets and shirts which have been smuggled and are only kept for the purpose of clandestine sale: Clay v. Protection Ins. Co., 1 Wright, 228.

CHAPTER XLI.

DESCRIPTION OF PROPERTY.

§ 1705. Accounts: Evidences and securities of property.
§ 1706. Advances: Advancements by charterer and master: Advances on freight.
§ 1707. "All or either": "Both or either."
§ 1708. Alteration and repairs of property.
§ 1709. Bank notes and bills of exchange.
§ 1710. Bottomry and respondentia.
§ 1711. Captor's interest: Prize of war.
§ 1712. Cargo.
§ 1713. Contingent or special interest in property of others.
§ 1714. Contraband of war: Belligerent and neutral property.
§ 1715. Curiosities: Scientific cabinets and collection.
§ 1716. Equitable interest may be covered by the term property.
§ 1717. Freight must be insured eo nomine.
§ 1718. Freight right reserved by owner and vendor: Whether such interest covered by insurance on freight.
§ 1719. Freight: Whether charterer may insure it eo nomine: Difficult to formulate a rule.
§ 1720. Same subject: The cases.
§ 1721. Same subject: Opinions of text-writers.
§ 1722. Same subject: Conclusion.
§ 1723. Freight: Designation of shipowner's interest.
§ 1724. Freight: Other interests.
§ 1725. Goods, wares and merchandise: Cargo.
§ 1726. Goods laden on deck.
§ 1727. Goods, wares and merchandises: "In trust or on commission": On consignment.
§ 1728. Clause "In trust or on commission" may be limited and controlled by other words in the policy.
§ 1729. Goods, etc., "sold but not delivered": "Sold but not removed."
§ 1730. Goods, etc., "in trust or on commission": On storage: Where policy requires specific declaration or separate insurance.
§ 1731. Where policy stipulates specific insurance of goods "in trust" and specifies what interest these words cover.
§ 1732. Goods or merchandises: Shifting and successive cargoes.
§ 1733. Goods or merchandise: Shifting and successive goods: After-acquired property: Fire risks.
§ 1734. What goods are covered may be determined by custom between the parties.

§ 1735. What goods are covered may be determined by known usage of a particular place.
§ 1736. Goods or merchandises to be described by indorsement: Approval of risks: Goods to be thereafter declared and valued: Marine risks.
§ 1737. Gunpowder: Marine.
§ 1738. House or building: Dwelling-house.
§ 1739. Houses and buildings: Connected structure and additions.
§ 1740. Household furniture: Hotel furniture.
§ 1741. Livestock: Marine risks.
§ 1742. Locality important in fire risks.
§ 1743. Locality: Property "contained in."
§ 1744. Locality: Property "contained in" connected or adjoining buildings: New buildings substituted for old.
§ 1745. Locality: "Contained in": Goods in different parts of building.
§ 1746. Locality: "Contained in": Removal of goods from a specified location: Permanent removal.
§ 1747. Locality: Temporary removal of property from a specified location.
§ 1748. Locality: Property on premises.
§ 1749. Locality: Premises owned and occupied: Property on wharf.
§ 1750. Locality: Occupation and ownership or use of premises acquired subsequently to issuing policy.
§ 1751. Manufactories: Factories: Mills.
§ 1752. Materials not included in "building": Unfinished vessel.
§ 1753. Medals and models: Specific description: Standard policy.
§ 1754. Money, specie, bullion, coin, treasure, jewels.
§ 1755. Painting: Patterns: Specific description: Standard policy.
§ 1756. Passage money.
§ 1757. Personal effects: Money, jewelry, etc.: Master's effects.
§ 1758. Personal property: Wearing apparel: Master's clothes: Baggage.
§ 1759. Plate: Specific description: Standard policy.
§ 1760. Profits and commissions.
§ 1761. "Property."
§ 1762. Provisions and provender: Marine risks.
§ 1763. Scientific cabinets and collections: Sculpture: Specific description: Standard policy.
§ 1764. Ship.
§ 1765. Ships: Stores and outfit: What ship includes.
§ 1766. Ship's boat or launch.
§ 1767. Ships: Character or kind of vessel: Rating.
§ 1768. Ships: Name important: Master's name.
§ 1769. Change of ship or master, or name of ship.
§ 1770. Ship's enrollment as affecting validity of policy.
§ 1771. Ship as privateer or letter of marque.
§ 1772. Ship or ships.
§ 1773. Ship or ships: Right to apply policy in case of different shipments and loss.

§ 1774. Stock of goods, etc., in manufacturing: Stock in trade of mechanic: Fire risk.
§ 1775. Stock in trade: Goods or merchandise for sale: Fire risks.
§ 1776. Stock in trade: Stock in building: Owner and goods of others.
§ 1777. Stock in trade, etc., may cover property specifically excluded, or the keeping of which is prohibited.
§ 1778. Whaling and fishing voyages: Outfits: Stores, catchings, etc.

§ 1705. Accounts—Evidences and Securities of Property of every kind are not included under the form of the Massachusetts standard fire policy unless specifically mentioned.[1]

§ 1706. Advances—Advancements by Charterer and Master—Advances on Freight.—As has been already stated the common printed English form of marine policy is generally written in, either in the body or elsewhere, upon the face of the policy, so as to cover the subject intended to be insured, the written part excluding by construction so much of the printed part as is not applicable, although the whole policy is to be construed together as far as possible and made to apply to the subject insured.[2] So where a policy was effected at Lloyds "on advances," the words being written in the valuation clause, it was held that not advances for repairs, but something independent of the ship, must be held to have been intended, such as money advanced in her business, since that which was printed fully described all parts of the ship.[3] Advancements by the charterer for shipping the homeward cargo may be made the subject of a distinct and special insurance, but are not covered by a policy on "specie and returns."[4] But advances consisting of money laid out by the master for the use of the ship may, by the usage of a particular trade, be recovered at respondentia interest under a policy on "goods, specie, and effects."[5] The ship-owner may by the designation

[1] Massachusetts Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.
[2] See sec. 1690, herein.
[3] Providence-Washington Ins. Co. v. Bowring (U. S. C. C. A. 1892), 50 Fed. Rep. 613.
[4] Winter v. Haldimand, 2 Barn. & Adol. 649, per Lord Tenterden.
[5] Gregory v. Christie, 3 Doug. 419. See further as to advances, secs. 997-1000, 1016, 1017, herein.

"freight" cover advancements made as part of the freight by the charterer under the charter-party.[6] An assignee of a charter-party may recover under the term "freight" actual advances on account of the charter-party as part of the freight,[7] although it is held that "advancements by the charterer" are not properly "freight," but the price of the privilege of putting the goods on board the ship for the opportunity of transportation, and should be specifically described as such advances.[8] Mr. Arnould sees no reason why they should not be insured eo nomine as freight, although he says "in practice it will be safer to insure it specially." Mr. Maclachlan says the question depends upon the terms of the charter-party.[9]

§ 1707. "All or Either"—"Both or Either."—If the policy be "on all or either" of certain designated buildings for a specified sum, and one of the buildings is destroyed, the insurers are liable for the entire loss not exceeding the amount insured.[10] So a marine policy on cargo or freight, "both or either to the amount insured, valued at the sum insured," is an insurance on cargo or freight as interest shall appear, not on either at the election of the assured. If only one of this species of property be at risk, it is covered; or it will cover both, if both be at risk, proportionately to the insured's interest in the respective subjects.[11]

[6] Etches v. Alden, 1 Man. & R. 165, per Bayley, J. See Winter v. Haldimand, 2 Barn. & Adol. 649; Allison v. Bristol M. Ins. Co., 1 App. Cas. 209; Williams v. North China Ins. Co., 35 L. T., N. S., 884; Saunders v. Drew, 3 Barn. & Adol. 445. See secs. 997, 1000, 1016, herein.

[7] Robbins v. New York Ins. Co., 1 Hall (N. Y.), 325. See Samson v. Ball, 4 Dall. (U. S.) 459.

[8] Winter v. Haldimand, 2 Barn. & Adol. 649, per Lord Tenterden.

[9] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 226, 227,*220, *221; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 34; citing Allison v. Berstock M. Ins. Co., 1 App. Cas. 209; De Silvale v. Kendall, 4 Maule & S. 37; Manfield v. Martland, 4 Barn. & Ald. 582; Winter v. Haldimand, 2 Barn. & Adol. 649; Wilson v. Martin, 11 Ex. 684; Hicks v. Shield, 7 El. & B. 633; 26 L. J. Q. B. 205; Williams v. North China Ins. Co., 35 L. T., N. S., 884; Maclachlan on Merchant Shipping, 519, 520; Ellis v. Lafone, 8 Ex. 546; 22 L. J. Ex. 124.

[10] Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136; 17 Am. Rep. 72.

[11] Faris v. Newburyport Ins. Co., 3 Mass. 476.

§ **1708. Alteration and Repairs of Property.**—Where property is insured under a fire policy, if alterations or repairs are not prohibited they may be made, unless they change or increase the risk, and the property is still covered, for the right to alter and repair is incidental to that of ownership.[12] "A ship," says Emerigon, "is always presumed the same, though all the materials which at first had given it existence have been successively changed,"[13] and an insurance upon the ship covers the ship when repaired.[14] The questions of alterations and repairs will, however, be more fully considered hereafter.[15]

§ **1709. Bank-notes and Bills of Exchange.**—There is a question whether bank-notes and bills of exchange should be specifically described in marine policies. They are not, technically speaking, cargo or merchantable goods or goods used in commerce, except possibly in those cases where they are intended to be used for the purchase of cargo; but if bills of exchange are specifically described, they are not covered except they be legal bills of exchange, as in case of bills payable on a contingency.[16] Bank bills are covered by the term "property," when the same are intended to be used in the coasting trade, the word "property" being held more comprehensive than "goods, wares, and merchandise."[17] Bills of exchange and notes are not, however, covered under the Massachusetts standard fire policy unless specifically mentioned.[18]

§ **1710. Bottomry and Respondentia.**—The interest of the lender on bottomry is a special interest, which must be specifically described and insured eo nomine; it is not covered by

[12] Dorn v. Germania Ins. Co., 8 Chic. Leg. News, 156; 1 L. & Eq. Rep. 132; James v. Lycoming F. Ins. Co., 4 Cliff. (C. C.) 272; Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236.

[13] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 7, p. 144.

[14] Livie v. Jansen, 12 East, 648; Le Cheminaut v. Pearson, 4 Taunt. 367.

[15] See chapters on increase of risk and loss, or average.

[16] Hill v. Patten, 8 East, 371, per Lord Ellenborough; Brown v. Stapylton, 4 Bing. 121, per Best, C. J., and Park, J.; Stainbank v. Fenning, 11 Com. B. 57.

[17] Whiton v. Old Colony Ins. Co., 2 Met. (Mass.) 1, per Shaw, C. J.

[18] Massachusetts Pub. Stats., pp. 213-15. Acts 1887, c. 214, sec. 60.

a policy in general terms, and the same is true of respondentia bonds. These securities are of themselves a species of insurance, and have always been expressed as on bottomry or respondentia by the custom of merchants, although another reason which has been assigned, and which does not now seem applicable under the common form of contract, is that there is neither average nor salvage, and a capture does not mean a temporary taking, but one that occasions a total loss.[19] Where the master borrowed money to repair the vessel in a foreign port, and designated his interest as "on bottomry," and the master bound himself for repayment eight days after his arrival at the port of London, it was held that the interest was well described, and that "after my arrival" meant after the ship's arrival, and not whether the ship arrived or not, although the words "whether she do or not arrive" were used.[20] And if the policy is in general terms, not specifically designating the interest, the insured is not aided by the fact that the

[19] "Considering the contract as bottomry only, it created a special interest, which, when insured, must be particularly expressed in the policy. This has long been determined to be the law and practice of merchants," per Kent, J., in Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250. See, also, Glover v. Black, 3 Burr. 1394; 1 Wm. Black. 396, 399, 405, 422; Kenney v. Clarkson, 1 Johns. (N. Y.) 394; Simonds v. Hodgson, 3 Barn. & Adol. 50; Emerigon on Insurance. Meredith's ed. 1850, c. viii, sec. 6, p. 173; 1 Marshall on Insurance, ed. 1810, *317, et seq.; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 229, *223, sec. 102; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 40, et seq.; 1 Phillips on Insurance, 3d ed., 234, sec. 427. See. also, sec. 1017, herein. This author also says in relation to the point of average and salvage: "But this reason has become somewhat obsolete, as bottomry is more frequently now made, expressly or by implication, subject to salvage, and entitles the lender to salvage, and subjects him to the expense of salvage in the same manner as an insurer, and the rate of marine interest and of the premium in effecting insurance on his interest is regulated accordingly": See further on this point, Gibson v. Philadelphia Ins. Co., 1 Binn. (Pa.) 405. "Taken by the enemy . . . . does not mean merely a temporary taking which is only an obstruction. To come within the clause, it must be such a taking as constitutes the loss of the ship, and which would amount, between the insurer and the insured, to a total loss," per Lord Mansfield, in Joyce v. Williamson, 3 Doug. 164; Insurance Co. v. Duval, 8 Serg. & R. (Pa.) 138.

[20] Simonds v. Hodgson, 3 Barn. & Adol. 50; 1 L. J. K. B., N. S., 51; reversing 3 Moore & P. 385; 6 Bing. 114.

words "grants, bargains, and sells" are contained in the bond, for the master as such can only pledge, and not sell, the vessel in such case.[21] The bond must also be a valid bottomry bond, otherwise the interest on bottomry is not covered.[22] So a joint insurance upon a bottomry bond given to two jointly, contrary to the prohibition of a statute, is void, although the lenders are copartners.[23] Mr. Marshall instances a case where a departure from the rule requiring a specific description of these interests is warranted by usage, the case being that where "goods, specie, and effects on board" covered a respondentia interest, in accordance with a usage of the East India trade to effect insurances of such interests in that manner.[24] And in a Massachusetts case on insurance the "property on board" is held to cover the captain's interest arising from an agreement with the owners that he should receive for his services a certain per cent of the return cargo.[25]

§ 1711. Captor's Interest — Prize of War.—As has been stated under a prior section, a captor's right to an interest in prizes depends upon a grant from the government, and the early English cases which were exhaustively discussed by the courts, and which have been constantly cited and reviewed by the text-writers, gave an insurable interest to captors in certain cases, based upon a reasonable expectation of a grant or a reasonable expectation of an allowance of the claim,[26] and it is upon this point of a reasonable expectation of a profit which is not actually a vested property, but which resembles an interest in probable profits, and the point of a vested interest in the government, that the question whether such interest should be specifically described has turned; it being held in the for-

[21] Robertson v. United Ins. Co., 2 Johns. C. (N. Y.) 250.

[22] Simonds v. Hodgson, 6 Bing. 114; 3 Moore & P. 385. Although the decision was reversed upon the construction of the instrument, it being decided a valid bond, the principle was not denied: Id., 3 Barn. & Adol. 50; 1 L. J. K. B., N. S., 51.

[23] Evereth v. Blackburn, 6 Maule & S. 152; 2 Stark. 58.

[24] 1 Marshall on Insurance, ed. 1810, *319, citing Gregory v. Christie, 3 Doug. 419.

[25] Holbrook v. Brown, 2 Mass. 280.

[26] Section 1025, herein.

mer case that the captor's interest must be specifically described, and the interest vested by grant need not be so designated, but may be covered by a general policy upon ship and cargo.[26]

§ **1712. Cargo.**—An insurance upon the cargo does not cover the ship. The word "cargo," says Emerigon, "signifies the contained," and the word "body," or "hull," signifies "the container and all its accessories," so that an insurance upon the body or hull does not cover merchandise or cargo on board. In certain cases usage may be resorted to in order to ascertain what is meant by the word "cargo." The insurance may, however, be so framed as to cover both ship and cargo.[27] The words "cargo and freight" do not cover goods laden on deck, or livestock, their provender, and their freight.[28] The word "cargo" is, however, so far synonymous with goods and merchandise in marine policies, that it will be further considered under the subsequent section covering those words.

§ **1713. Contingent or Special Interest in Property of Others.** — If there is nothing upon the face of the policy to indicate that it was intended to cover other than the insured's interest in property as owner, the policy should be limited to that species of property which naturally and obviously is included within its terms and cannot be extended in its terms by implication so as to cover a special and contingent interest in the property of others, although the locality of the property might seem to bring it within the descriptive words of the policy. This is illustrated by the case where a fire policy was effected by a railroad corporation upon "all the wood and logs cut and piled along the line of their railroad" between specified points. About two hundred cords of wood and a quantity of hemlock logs were piled and lying upon land not

[26a] Routh v. Thompson, 11 East, 433, per Lord Ellenborough; s. c., 13 East, 274.

[27] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, pp. 233, 234; Houghton v. Gilbert, 7 Car. & P. 701; 1 Marshall on Insurance, ed. 1810, 320 a.

[28] Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429. See, also, secs. 1726, 1741, 1762, herein.

owned or occupied by the railroad company, the piles being only a short distance from the railroad, but none of the wood was owned by the company, and it was held that the contingent interest of the railroad in the property of others endangered by fire from its engines was not covered unless specifically described. In this case the wood was consumed by fire kindled by sparks from the locomotive, and it also appeared that the company had property along the line of its road which came within the description.[29]

§ 1714. Contraband of War—Belligerent and Neutral Property.—Emerigon says: "In cases where it is allowed to insure goods of contraband or enemies' property, it is just that the insurers should be informed of it, because of the increased risk." [30] Mr. Duer is of the opinion "that an insurance on contraband of war is a valid contract, but that the underwriter is never responsible for a loss occasioned by the seizure of goods unless their true character was known. . . . . His consent to assume the risk is never to be implied from the use of general terms in the policy that in their literal extent embrace the property. . . . . Where the goods insured, although described by general words, are declared in the policy to be contraband of war, the agreement on the part of the assurer to assume the risk is express, and it may be regarded as equally so where the goods that are in fact contraband by the general law of nations, although not so declared in the policy, are specifically insured by their appropriate names. . . . . But where the consent of the underwriter to assume the risk does not appear in any form on the face of the policy," it must appear that he had knowledge of their character, or that other circumstances or usages of trade exist whereby he is bound to infer their character.[31] Mr. Arnould says: "Al-

[29] Monadnock R. R. Co. v. Manufacturers' Ins. Co., 113 Mass. 77. See sec. 898, herein.

[30] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 243.

[31] 2 Duer on Marine Insurance, ed. 1845, 612, citing numerous foreign authorities, and Richardson v. Maine Ins. Co., 6 Mass. 102; 4 Am. Dec. 92; Cook v. Essex F. & M. Ins. Co., 6 Mass. 122; Maitland v. Gray, 6 Mass. 124; Parker v. Jones, 13 Mass. 173; Archibald v.

though the underwriter would not be held liable unless he were told of the nature of the intended risk, yet it has never been decided that the contraband character of the cargo must be specified in the policy," and Mr. Maclachlan, in his edition of Mr. Arnould's work, says the same.[32] It is declared that "if goods contraband of war are on cargo, the assurer is not responsible for their capture and condemnation on that account, unless either with a full knowledge of the nature of the goods and of the voyage, or by an express undertaking, he shall insure them against such capture." [33] The rule as stated by an eminent authority in this country is, that although the policy is in general terms, the underwriter cannot be presumed to undertake risks occasioned by the insured or his agents in known violation of law, and that it is well settled that the general terms of the policy do not render the underwriters liable for any loss arising from foreign or illicit trade, unless the policy be written with a full knowledge that the object of the voyage was illicit trade.[34] If contraband articles are specifically named in the policy, the insurers assume the risk, unless the printed clauses by construction with the written description exclude the presumption that the underwriters intended to assume such risk. This, however, is a question of construction, governed by the general rule that the written control the printed clauses, except it be possible to construe them together and so effectuate the intention of the parties.[35]

Mercantile Ins. Co., 3 Pick. (Mass.) 70; 3 Kent's Commentaries, 5th ed., 268.

[32] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 216, *212; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 26.

[33] Richardson v. Maine Ins. Co., 6 Mass. 102; 4 Am. Dec. 92, per Parsons, C. J.

[34] Andrews v. Essex F. & M. Ins. Co., 3 Mason (C. C.), 6, per Story, J. See Seton v. Low, 1 Johns. C. (N. Y.) 1, per Kent, C. J. To the same effect are Skidmore v. Desdorty, 2 Johns. Cas. (N. Y.) 77; Juhel v. Rhinelander, 2 Johns. Cas. (N. Y.) 120; affirmed, 2 Johns. Cas. (N. Y.) 487; Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141. It will be observed that these decisions conflict with the Massachusetts cases above cited, and Chancellor Kent says that they are overruled: 3 Kent's Commentaries, 5th ed., 268.

[35] Goicoechea v. Louisiana State Ins. Co., 18 Mart. (La.) 51; 17 Am. Dec. 175; Andrews v. Essex F. & M. Ins. Co., 3 Mason (C. C.), 6; Seton v. Delaware Ins. Co., 2 Wash. (C. C.) 175.

Belligerent and neutral property are covered by a general policy which contains no warranty of neutrality and insures all persons interested.[36]

§ **1715. Curiosities—Scientific Cabinets and Collections** are not covered under the Massachusetts Standard fire policy unless specifically mentioned.[37]

§ **1716. Equitable Interest may be Covered by the Term "Property."**—A bona fide equitable interest in property, even though the legal title be in another, is covered by the term "property," [38] And unless the terms of the policy require a disclosure of the exact interest, or specific inquiries concerning the same are made, the equitable interest of a person who holds possession under a contract of purchase, the legal title being in another, may be described by the insured as his property without more specific designation.[39] But it is also held by Mr. Justice Story that a common policy on the ship covers only the legal ownership, and if the insured has a special or equitable ownership, he must give notice to the underwriter, on the ground that the nature of such a title is ordinarily material to the risk, and that there is an implied representation that the ship's papers are according to the real legal ownership. In this case the equitable title was sought to be established, however, by parol.[40] This case was distinguished from a New York case where the equitable title and the possession of the ship was held under a written contract of sale from the legal owner. A large portion of the purchase money

[36] Hodgson v Marine Ins. Co., 5 Cranch (U. S.), 100.

[37] Pub. Stats. Mass., pp. 713-15; acts 1887, c. 214, sec. 60.

[38] Locke v. North American Ins. Co., 13 Mass. 61; Gaylord v. Lamar Ins. Co., 40 Mo. 13; Bartlett v. Walker, 13 Mass. 267; Pelton v. Insurance Co., 77 N. Y. 605; Tyler v. Ætna Ins. Co., 12 Wend. (N. Y.) 507; 16 Wend. (N. Y.) 385.

[39] Walsh v. Philadelphia F. Assn., 127 Mass. 383; Insurance Co. v. Wilgus, 88 Pa. St. 107; Franklin F. Ins. Co. v. Martin, 11 Vroom (N. J.), 568; 20 Am. Rep. 271; Insurance Co. v. Nelson, 65 Ill. 415; Hough v. City Ins. Co., 29 Conn. 10; Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149; Insurance Co. v. Boomer, 52 Ill. 442; Pelton v. Insurance Co., 77 N. Y. 605.

[40] Ohl v. Eagle Ins. Co., 4 Mason (C. C.), 390.

had been paid, and a recovery for a total loss was adjudged, although the equitable interest was neither specified in the policy nor disclosed.[41]

§ 1717. Freight Must be Insured Eo Nomine.—It is well settled that freight must be insured eo nomine.[42] So upon an insurance on goods the underwriters are not liable for freight pro rata itineris paid by the owners of the goods to the shipowner, for the insurers on cargo have nothing to do with the freight.[43]

§ 1718. Freight—Right Reserved by Owner and Vendor—Whether Such Interest Covered by Insurance on Freight. In a much discussed New York case the owner sold his vessel under an agreement with the purchaser, in whose name the ship was registered, that the original owner should have the benefit of freight to be earned on a voyage for which he had previously chartered the ship. The purchaser insured as owner for the voyage, and the vendor also effected a policy on freight on the goods on the same voyage, and it was held that one who is not the owner of the vessel, although he may have an interest in the earnings, cannot insure his interest under the general designation of "freight," but must specifically describe his interest, since it does not accrue to him as owner; that by failing to disclose the nature of his interest he imposes upon the insurer, who may rightfully assume that in insuring "freight" he is insuring the owner of the ship, and not a stranger, and that to permit the latter to insure "freight" with-

[41] Kenney v. Van Horne, 1 Johns. (N. Y.) 385. See Locke v. North America Ins. Co., 13 Mass. 61; Oliver v. Greene, 3 Mass. 133. Examine secs. 896, 1696, herein; chapter on evidence, sec. 3762; "Insurable interest in ship and the ship's register," and see secs. 1822, 1859, herein.

[42] 1 Phillips on Insurance, 3d ed., 259, sec. 469; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 225, *220; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 34; 1 Duer on Marine Insurance, ed. 1845, 448, sec. 44; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 243, states the same rule as to freight earned.

[43] Baillie v. Modigliani, reported in 2 Marshall on Insurance, ed. 1810, 728 a; 1 Park on Insurance, 116, per Lord Mansfield; Gibson v. Philadelphia Ins. Co., 1 Binn. (Pa.) 405.

out explanation would lead to abuse and fraud by affording an opportunity for cumulative insurances.[44] This decision has been criticised by Mr. Phillips;[45] also by Judge Duer[46] and by Mr. Parsons.[47] Mr. Arnould says the vendor ought, in such case, to have an insurable interest in the freight to be earned, for he stands precisely in the situation of a charterer who takes goods on freight.[48] And Mr. Maclachlan refers to the doubts raised by this New York case, but says that neither in this country nor in England "have such doubts prevailed against the opinion that such persons have an interest which may be covered by a valid policy on freight." [49]

§ 1719. Freight—Whether Charterer may Insure It Eo Nomine—Difficult to Formulate a Rule.—Whether a charterer can insure freight eo nomine has been a subject of much discussion. We have noted under the last section the criticisms upon the case of Riley v. Delafield,[50] and have under a preceding chapter considered the question of the insurable interest of the charterer in freight. But upon the point whether a charterer may insure under the name of freight generally, without particularly specifying his interest, it is difficult to formulate a rule which will be clearly supported by the weight of authority, since there is at the least an apparently irreconcilable conflict in the authorities.

§ 1720. Same Subject—Cases.—In a New York case[51] the insured under a general policy upon freight was assignee of a

[44] Riley v. Delafield, 7 Johns. (N. Y.) 522. See Robbins v. New York, 1 Hall (N. Y.), 325; Mellin v. National Ins. Co., 1 Hall (N. Y.), 452; Cheriot v. Baker, 2 Johns. (N. Y.) 346.

[45] 1 Phillips on Insurance, 3d ed., sec. 40; citing Taylor v. Wilson, 15 East, 324; Oliver v. Greene, 3 Mass. 133, per Parsons, C. J.; Bartlett v. Walter, 13 Mass. 267; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289, as opposed thereto.

[46] 2 Duer on Insurance, ed. 1846, 452, sec. 47, et seq., note a, p. 453.

[47] 1 Parsons on Marine Insurance, ed. 1868, 186, n. 1; 528, n. 2, citing the same authorities as Mr. Phillips.

[48] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 265, *259; Id. 228, *222.

[49] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 35. See, also, 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 62.

[50] 7 Johns. (N. Y.) 522.

[51] Robbins v. New York Ins. Co., 1 Hall (N. Y.), 325.

charter-party. There was no obligation to pay the chartered freight until the safe arrival of the ship, and it was held that the insured could not insure freight eo nomine, although an actual advance on account was declared recoverable.[52] So where the plaintiff under an insurance on freight chartered a vessel and agreed to pay a specified sum for freight on delivery of the cargo, of which he was the owner, and the ship being lost no cargo was delivered and no freight became due, it was decided that there could be no recovery.[53] In a Massachusetts case[54] one A., part owner of the vessel, hired of M., a part owner, his moiety for eighteen months, agreeing to pay therefor a certain sum per month, and if the vessel was lost during the term, A. was to pay M. a specified sum for his share. The charterer insured his interest generally without any further designation, and it was held that he was entitled to recover the amount insured, he being interested in the vessel to that sum.[55] So where the charterer agreed to pay a certain sum for the ship for the out passage, and a like amount for the return passage, and insured the out freight under a valued policy for an amount about equal to the freight he was to receive at the outport, and nothing became due the shipowner because of the loss of the ship on her outward voyage, it was held that the charterer's interest was protected by the policy; the case turning upon the point whether the valuation was made with a full knowledge of the facts and was fair, and not a cover for a wager.[56] It was held in this last case that the charterer might set up the ship as a general freighting ship, and would "stand as owner pro haec vice in relation to those who should load her. He would assume the risks and dangers of the sea in respect to them just as the original or absolute own-

[52] See, also, Mellin v. National Ins. Co., 1 Hall (N. Y.), 452; Huth v. New York M. Ins. Co., 8 Bosw. (N. Y.) 138.

[53] Cheriot v. Baker, 3 Johns. (N. Y.) 346.

[54] Oliver v. Greene, 3 Mass. 133, per Parsons, C. J.

[55] See Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Flint v. Flemyng, 1 Barn. & Adol. 45; 8 L. J. K. B. 350. See, also, cases cited in sec. 1009, herein.

[56] Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289. See, also, Taylor v. Wilson, 15 East, 324.

er had assumed the risks in respect to him," and that if he was to pay a certain sum for the hire, and was to receive a larger sum from those who loaded her, the excess would be at his own risk in case of loss.[57] Other cases bearing upon this subject have been noticed under preceding sections.[58]

§ 1721. Same Subject—Opinions of the Text-writers. Mr. Arnould says: "It is clear law in this country [England] that the ship-owner has an insurable interest in the benefit which he expects to derive or the profit he expects to make by carrying his own goods in his own ship, and may protect this interest under a general insurance on freight. There is no reason why the charterer, who under the circumstances is supposed to stand in the same position, may not do the same." [59] Mr. Parsons is of the opinion that "a charterer may insure under the name of freight what he is to receive for carrying the goods of others, provided that amount is at his risk"; he also says in regard to the profit the charterer expects to make from carrying his own goods: "We do not know why the charterer does not stand in the same condition with the shipowner, and as the shipowner has an insurable interest in the freight of his own goods which he may insure under that name, the charterer should have an insurable interest in the carriage of his own goods, and may insure it simply as freight. . . . . We believe that the charterer may insure his interest in the freight under the word 'freight.' " [60] Mr. Phillips deduces from the cases the rule "that a charterer who is the only person interested in the freight or a part of it, or is bound by his agreement to insure it, and make it good at all events, may insure it generally to the amount of his interest, without particularly specifying it." [61]

[57] Per Putnam, J.

[58] See secs. 1007-1010, 1012, 1015, 1016, herein.

[59] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 227, 228, 265, *221, *222, *259; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 34.

[60] 1 Parsons on Marine Insurance, ed. 1868, 173, 174, 529, notes.

[61] 1 Phillips on Insurance, 3d ed., 262, 263, secs. 480, 481, relying upon Taylor v. Wilson, 15 East, 324; Oliver v. Greene, 3 Mass. 133; Bartlett v. Walter, 13 Mass. 267.

§ **1722. Same Subject—Conclusion.**—Were we to formulate a rule, we should only state in substance what is contained in the opinions of Mr. Arnould, Mr. Parsons, and Mr. Phillips, noted under the last section, with which opinions we fully concur, and which find support in the words of Putnam, J., in Clark v. Ocean Insurance Company,[62] and are sustained upon analogy and principle by the cases relied on; and we would suggest that in all cases where the charterer has an insurable interest in freight as such, and the insurance is fairly made by the parties with a full knowledge of the material facts, the amount of interest which the charterer has at risk, under such circumstances, ought to be fully protected within the rules of indemnity by a general policy on freight and by that name without more specific description

§ **1723. Freight—Designation of Shipowner's Interest.** By reason of the extensive meaning of the word "freight," that term as used in policies of insurance signifies all the benefit derived by the shipowner either from the chartering of the ship or its employment for the carriage of the goods of others, and the shipowner may also, under the general designation of "freight," insure the profit he expects to realize from the increased value of his own goods arising from their transportation in his own ship.[63] In case of insurance of the shipowner's profit in carrying his own goods, it is better to insure goods and freight together, describing them as goods and freight.

§ **1724. Freight—Other Interests.**—Where by a written clause the insurance was "declared to be on freight earned or not earned, policy to be proof of interest," freight, and not

[62] 16 Pick. (Mass.) 289.

[63] Flint v. Flemyng, 1 Barn. & Adol. 45, per Lord Tenterden; Riley v. Hartford Ins. Co., 2 Conn. 373; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 143; Denorn v. Home etc. Assur. Co., L. R. 7 Com. P. 341; De Vaux v. Jansen, 5 Bing. N. C. 519; Clark v. Ocean Ins. Co., 16 Pick. (Mass.) 289, per Putnam, J.; Hart v. Delaware Ins. Co., 2 Wash. (C. C.) 346; M'Gaw v. Ocean Ins. Co., 23 Pick. (Mass.) 409, per Shaw, C. J.; Etches v. Alden, 1 Man. & R. 157; Cal. Civ. Code, sec. 2661. But see Dumas v. Jones, 4 Mass. 647.

cargo, was held within the terms.[64] "Freight on board," means freight of the vessel.[65] Freight is susceptible of apportionment as between the owners and the insurers, so as to give to each of the parties the usufruct of the ship during the time of their respective ownership.[66] Where a policy was on freight from a certain port, and part of the outward cargo was bartered for other cargo which was taken on board, it was held that the freight covered only the substituted cargo, and not any part of the outward cargo remaining on board;[67] nor does a cargo on freight valued cover specie.[68] The earnings of a ship on a fishing voyage are not "freight" in this country, but are otherwise designated in the policy.[69] Freight is not covered by the term "property," and where an insurance was on property on board, a part of the cargo being timber, three-fifths of which was to be taken as freight, it was held that the policy covered three-fifths of the lumber, but not the freight of the rest of the cargo.[70] Freight generally does not cover the freight of goods laden on deck, since a policy would not generally attach to goods so laden, for the risk is greater than that contemplated.[71] This rule is, however, subject to such exceptions as may arise in case of usage or a particular designation or disclosure of the nature of the risk.[72] Many of the principles underlying the question of attachment and duration of the risk on goods and freight are applicable here, and it will be sufficient to refer to the chapter thereon, as they are more fully stated there than could be done here except by unnecessary repetition.[73]

[64] Huth v. New York Ins. Co., 8 Bosw. (N. Y.) 538.

[65] Robinson v. Manufacturers' Ins. Co., 1 Met. (Mass.) 143.

[66] Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367; 6 Am. Dec. 499.

[67] Forbes v. Cowie, 1 Camp. 520.

[68] Adams v. Pennsylvania Ins. Co., 1 Rawle (Pa.) 97.

[69] 1 Phillips on Insurance, 3d ed., 269, sec. 496.

[70] Wiggin v. Mercantile Ins. Co., 7 Pick. (Mass.) 271.

[71] Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; Dodge v. Bartol, 5 Me. 286; Toledo F. & M. Ins. Co. v. Speares, 16 Ind. 52. See sec. 1726, herein.

[72] Milward v. Herbert, 3 Ad. & E., N. S., 120; Northwestern Ins. Co. v. Ætna Ins. Co., 26 Wis. 78. And sec. 1726, herein.

[73] See c. xxxvii, herein.

§ **1725. Goods, Wares and Merchandises—Cargo.**—The policy in marine risks may be upon goods or merchandise generally. A policy on goods need not specify the different kinds; this arises both from the fact of the almost impossibility of particularizing in many cases, and again the policy is so framed, by reason of the usual memorandum clause, as to afford protection to the underwriter in case of articles perishable in their nature.[74] The question might, however, arise whether the words "laden under deck" are more conclusive than the implied condition, and would supersede a well-known and well-ascertained usage so as to exclude evidence thereof.[75] As a general rule, one may, by the terms "goods" or "merchandise" secure the protection of the policy upon such goods of the insured as are on board at the time of loss. This rule, however, does not apply to those cases where the nature or kind of the goods are such as to require a specific designation.[76] The term "cargo" is held to be one of extensive signification, and to mean the lading of a ship of whatever it consists.[77] When the cargo consists of a few articles, or of goods valued by the hogshead, pipe, bale, etc., it is customary to specify them, but under the English form of policy this would not be necessary.[78] An insurance on the "cargo" or "goods and merchandise" of a whaling ship will cover oil and other articles which are the

[74] The English form of the policy is "upon any kind of goods and merchandises." Of the cargo found in use here we will notice two; thus, one form is, "Upon —— valued at —— laden or to be laden under deck on board." Another is, "Upon —— laden or to be laden on board."

[75] See secs. 1718, et seq., and sec. 1726, herein.

[76] For the general principles above stated, see 1 Marshall on Insurance, ed. 1810, *316; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 214, et seq., *210, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 24, et seq. "It suffices," says Emerigon, "that the aliment of the risk is found contained in the ship to render the insurance on cargo and goods valid; for, as the Guidon decides, there is no need in insurance to specify the quantity or quality of the merchandise insured": Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, p. 233.

[77] Macy v. Whaling Ins. Co., 9 Met. (Mass.) 354.

[78] De Symonds v. Shedden, 2 Bos. & P. 153; 1 Marshall on Insurance, ed. 1810, *317; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 221, *215; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 29, 30.

ordinary products of the voyage.[79] The clause "goods laden or to be laden" on board covers all goods laden and to be laden embraced in the contract.[80] "Merchandise," in marine policies, is said to include all property of great value on board ship and not attached to the person of passengers.[81] An insurance by common carriers on a canal on "goods and merchandise" was held a sufficient description to cover their interest.[82] "Merchandise," as used in a fire policy, does not cover every kind of inanimate movable property; so that a policy on "grain and other merchandise" in warehouses is held not to cover a platform scale bedded in the floor, a beam scale, corn-sheller, and belting, although they had been dispensed with in the business and offered for sale, nor does it include implements used or necessary to the business,[83] although as a rule "merchandise" will cover, without more specific designation, all property kept for sale and all kinds of goods in which the assured deals.[84] Under a policy on "merchandise" a small railroad car and a mast and boom in store for sale were held covered;[85] and "merchandise" will cover a curricle,[86] and also furniture, wearing apparel, and books.[87] Goods "shipped on board the G. Steamship Co." covers goods on a chartered ship of the company.[88] Goods being landed in shallops, boats, or launches, according to usage, in such cases are covered.[89] Cargo temporarily landed may be covered.[90] Goods remaining on

[79] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Hill v. Patten, 8 East, 374.

[80] Hinck v. Home Ins. Co., 19 La. Ann. 527.

[81] Brown v. Stapleton, 4 Bing. 119, per Park, J. See Hill v. Patten, 8 East, 374, per Lord Ellenborough.

[82] Crowley v. Cohen, 3 Barn. & Adol. 478.

[83] Kent v. Liverpool & London Ins. Co., 26 Ind. 294; 29 Am. Dec. 463.

[84] Stillwell v. Staples, 19 N. Y. 401.

[85] Burgess v. Alliance Ins. Co., 10 Allen (Mass.), 22.

[86] Duplanty v. Com. Ins. Co., Anth. (N. Y.) 114.

[87] Siter v. Morrs, 13 Pa. St. 218.

[88] Crosswell v. Mercantile Mut. Ins. Co., 19 Fed. Rep. 24. See Red Wing Mills v. Mercantile Mut. Ins. Co., 19 Fed. Rep. 115.

[89] Stewart v. Bell, 5 Barn. & A. 238. Section 1569, herein. See sec. 1599, herein.

[90] Section 1576, herein.

board after the bulk of the cargo is discharged are not covered.[91]

§ **1726. Goods Laden on Deck.**—Goods laden on deck, in order to be covered by the policy, must be specifically mentioned, or it must be stated in the application that they are so shipped. Goods so stowed are not covered by a policy on "cargo," "goods," or "merchandise," or "goods and merchandise." The risk on goods so laden is greater than when laden the customary way, nor are they considered as part of the cargo in which other shippers are interested.[92] The rule, however, is subject to such exceptions as arise in the case of usage, or where such goods are so carried with the consent of the insurer, or where the policy is on property specifically named and is of a character which is usually carried on deck, not only for its own safety, but the safety of the ship, in which last case the insurer is presumed to know that they were intended to be insured as laden.[93] But in cases where usage is relied upon, the question is held to go beyond mere proof of the fact that it was customary so to stow the goods, and that it must be shown as evidencing the intent to insure goods so stowed that losses have been paid by insurers in like cases under a general policy.[94] It would seem, however, that the principle underlying the cases so deciding ought not to be held to require anything more than clear and satisfactory proof that such a custom exists, so as to raise the presumption that the insurers have knowledge there-

[91] Moore v. Taylor, 1 Ad. & E. 25; 3 Nev. & M. 406. See c. xxxvii, herein.

[92] Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. (Mass.) 108; Lenox v. United Ins. Co., 3 Johns. C. (N. Y.) 178; Allegre v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; 20 Am. Dec. 424; Smith v. Mississippi Ins. Co., 1 La. (O. S.) 142; 30 Am. Dec. 714; Dodge v. Bartel, 5 Me. 286; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Toledo F. & M. Ins. Co. v. Spears, 16 Ind. 52; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163; Miller v. Titherington, 7 Hurl. & N. 954; 31 L. J. Ex. 363; affirming 6 Hurl. & N. 278; 30 L. J. Ex. 217.

[93] Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 34; De Costa v. Edmunds, 4 Camp. 142; 2 Chit. 227; Blackett v. Royal Ex. Assur. Co., 2 Cromp. & J., per Lord Lyndhurst, C. B.

[94] Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 34; Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. (Mass.) 108. See Northwestern Iron Co. v. Ætna Ins. Co., 26 Wis. 78.

of;[95] but if both the character of the goods are specified and a usage of long standing to stow such goods on deck is shown, and they are laden on the deck of a steamer, their loss, they being necessarily jettisoned, will be covered by the policy.[96] Where the application failed to state that the goods were shipped on deck, and the underwriters had no knowledge of that fact, it was held that there could be no recovery. It appeared, however, that the fact was stated in the bill of lading which was given to the secretary of the company, but the secretary did not open or read it.[97] In this connection the case of Wood v. Phoenix Insurance Company[98] is important. The action was a libel by the owner of goods jettisoned to recover contribution by general average. The cargo, which was iron, was loaded a part under and a part on deck, and the insurance was upon the part stowed under deck, but the underwriter knew that a part was loaded above deck. The deckload was, however, not included in the policy, because the insured was unwilling to pay the underwriters the terms asked. It was sought to establish a custom of the trade in shipping cargo of such a character to load a part thereof on deck. The court held that in the absence of clear evidence of such a custom, the claim against the underwriters could not be sustained, although it was admitted that if such a custom were proven, it constituted an exception to the general rule. The other exceptions noted were where the goods are carried on deck by contract and where they are so carried on steam vessels. The decision is valuable, and extensively reviews the authorities.[99] Mr. Arnould is, however, of the opinion that as "the custom only applies to certain descriptions of goods in any trade, it may be doubtful whether even in this case the goods ought not to be specifically described in the policy in order that the underwriter may be

[95] See Wood v. Phœnix Ins. Co., 1 Fed. Rep. 235. Sections 255-258, herein.

[96] Merchants' & Manufacturers' Ins. Co. v. Shillito, 15 Ohio St. 559.

[97] Smith v. Mississippi Ins. Co., 11 La. 142; 30 Am. Dec. 714.

[98] 1 Fed. Rep. 235.

[99] See, also, Milward v. Hibbert, 3 Ad. & E., N. S., 120; 11 N. J. Q. B., N. S., 137; Miller v. Titherington, 7 Hurl. & N. 278; 30 L. J. Ex. 217; Rogers v. Mechanics' Ins. Co., 1 Story (C. C.), 603.

apprised that he is to run the extra risk"; and Mr. Maclachlan expresses the same doubt and caution.[100]

§ **1727. Goods, Wares, and Merchandise "in Trust or on Commission"—On Consignment.**—An insurance upon goods held in trust or on commission covers goods held by the assured on storage, for which he is to receive a compensation.[101] The phrase "held in trust" must be understood in a mercantile sense, and not in a strictly technical sense,[102] and the words "held by them in trust" will extend to and cover property held exclusively in trust for railroad companies, who have an insurable interest in such goods; the words cannot be limited so as to exclusively apply to a holding in trust only for an absolute owner.[103] An insurance on a stock in trade, on consignment, or held in trust, covers goods bought on the joint account and to be sold for mutual profit of the insured and another not named in the policy.[104] The clause "in trust or on commission" covers cloth sent the insured to be manufactured into clothing,[105] and goods intrusted to a warehouseman for keeping are covered under the words "merchandise held in trust."[106] And the same is true of the words "in trust or on commission," even though one is not bound to insure the same, and without regard to the fact whether the insured had a lien thereon or not for storage.[107] So household furniture and wearing apparel in the warehouse of a commission and forwarding firm, and also books deposited with them subject to the owner's orders, are covered by a clause insuring merchan-

[100] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 213,: *213; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 27.

[101] Home Ins. Co. v. Favorite, 46 Ill. 263.

[102] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. (3 Otto) 527; Lucas v. Insurance Co., 23 W. Va. 258; 48 Am. Rep. 383; Home Ins. Co. v. Favorite, 46 Ill. 263.

[103] California Ins. Co. v. Union Compress Co., 133 U. S. 387; 10 Super. Ct. Rep. 365; 19 Ins. L. J. 385; 7 Rail. & Corp. L. J. 363. See, also, Hough v. People's F. Ins. Co., 36 Md. 398; Snow v. Carr, 61 Ala. 363.

[104] Millaudon v. Atlantic Ins. Co., 8 La. (O. S.) 558.

[105] Stillwell v. Staples, 19 N. Y. 401.

[106] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. (3 Otto) 527.

[107] Waters v. Monarch Ins. Co., 5 El. & B. 870; 25 L. J. Q. B. 102.

dise generally, "and without exception, their own or held in trust or on consignment."[108] So the words "held in trust" will cover the interest of a commission merchant or other consignee in goods consigned to him.[109] Goods pawned may be covered by like words.[110] But a policy on goods bought at the assured's own risk does not cover goods consigned to him nor his commissions thereon.[111]

§ 1728. Clause "in Trust or on Commission" may be Limited and Controlled by Other Words in the Policy. The meaning of the words "in trust or on commission" may be limited and controlled by the use of other words and clauses. Thus, where the insurance was upon "merchandise, the insured's own, in trust or on commission," followed by the clause "for which they are responsible," it was held that said clause controlled the rights of the parties, and that the policy did not cover goods deposited in bond for which the warehousemen gave wharfingers' warrants, deliverable to the persons named therein or assigns, upon payment of duty and warehouse charges, which goods were purchased by the assured from importers, who indorsed the warrants in blank and delivered them to the insured, who in time sold them to others on credit under an agreement to have the goods cleared and delivered. For these goods the insured were in no way responsible to the purchasers in case of loss by fire, and were under no obligations to have them insured, nor were the purchasers either charged with the premiums nor in any way liable therefor, and the assured would not be aided in such case by the fact that they paid the purchasers the value of the goods destroyed by fire, since such payment must be held to have been voluntarily made under the circumstances.[112]

§ 1729. Goods, etc.—"Sold but not Delivered"—"Sold but not Removed."—The words "sold but not delivered"

[108] Siter v. Morrs, 13 Pa. St. 218.

[109] Parks v. General Mut. Ins. Co., 5 Pick. (Mass.) 34; Johnson v. Campbell, 120 Mass. 449.

[110] In re Wright, 1 Ad. & E. 621.

[111] Toppan v. Atkinson, 2 Mass. 365.

[112] North British & Mercantile Ins. Co. v. Moffatt, 7 L. R. Com. P. 25; 41 L. J. Com. P. 1.

apply to goods or property which have been sold, but the ownership of which has not been changed by delivery.[113] So the words "their own or held by them in trust or on commission, or sold but not delivered," in a policy issued to a packing establishment will cover goods held on storage, although not held for sale or commission, for the clause should not be limited in its operation to cases where the title of goods has been vested in a trustee.[114] And a policy upon "property held by it in trust or sold but not delivered, and piled on the docks," will cover property sold, piled, and marked for delivery awaiting removal by the purchaser.[115] The words "sold but not removed" have, however, a more extensive meaning than the words "sold but not delivered," for in the former case it makes no difference that the title to the property and the ownership and right to control has passed to another by delivery; the gist of the obligation is that the property has not in fact been removed, and to that extent it is covered by a policy containing the clause "sold but not removed." [116]

§ 1730. Goods, etc.—"In Trust or on Commission"—On Storage—Where Policy Requires Specific Declaration or Separate Insurance.—If by the express stipulations of the policy goods held in trust or on commission or on storage are to be particularly described or specified, or expressly declared as such or separately insured, such provision must be complied with, and an insurance upon goods generally, or in fact otherwise than in such terms as to apprise the insurers of the character of the risk in conformity with the special requirement, will not cover goods in trust or on commission.[117] And in such case, if the policy indicates that no other interest than that of ownership in the goods is covered, the indemnity will be confined to that interest, and if it appears that the

[113] Waring v. Indemnity F. Ins. Co., 45 N. Y. 606.

[114] Home Ins. Co. v. Favorite, 46 Ill. 263; Phœnix Ins. Co. v. Favorite, 49 Ill. 259.

[115] Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482; 52 N. W. Rep. 1070.

[116] Waring v. Indemnity F. Ins. Co., 45 N. Y. 606.

[117] Baltimore F. Ins. Co. v. Loney, 20 Md. 20.

goods destroyed are held in trust merely, and that the insured is not the owner of any of them, and is not subjected to any loss or liability by the fire, there can be no recovery;[118] and it is so held even though the property be goods held on commission, and upon which the insured has a lien for advances.[119] If a policy be effected upon a stock of music and musical instruments, and the policy provides that goods held in storage must be specifically and separately insured, a piano received from the owner to be forwarded to another place for repairs is covered to its full value by the clause "held by him in trust or on commission";[120] nor under such a requirement will a policy upon "jewelry and clothing, being his stock in trade," effected by a pawnbroker, cover articles in pawn.[121]

§ 1731. Where Policy Stipulates Specific Insurance of Goods "in Trust" and Specifies what Interests those Words Cover.—Where the policy stipulates that property held in trust must be insured as such, and also specifies what interests are intended to be covered by the words "in trust," the requirement is thereby limited in its application to the interests expressly designated as those intended to be covered. Nevertheless, an interest arising out of a secret trust in fraud of creditors will not be protected, even though technically within the terms of the specification. Thus, where the stipulation is that "property held in trust must be insured as such," and the clause follows, "By property held in trust is intended property held under a deed of trust or under appointment of a court, or held as collateral security," property held in trust to defraud the owner's creditors is not within the protection of the limiting clause, but, otherwise, where the property is held as security for a debt.[122]

§ 1732. Goods and Merchandise—Shifting and Successive Cargoes.—Emerigon says: "Effects laden on board

[118] Duncan v. Sun Mut. Ins. Co., 12 La. Ann. 486.

[119] Brichta v. La Fayette Ins. Co., 2 Hall (N. Y.), 372.

[120] Lucas v. Liverpool etc. Ins. Co., 23 W. Va. 258; 48 Am. Rep. 383. See Dalglish v. Buchanan, 16 C. C. S. 332; 26 Scot. Jur. 160.

[121] Rafel v. Nashville Co., 7 La. Ann. 244.

[122] Ayres v. Hartford F. Ins. Co., 17 Iowa, 176.

during the course of the voyage for account of the insured are covered by a general insurance on the cargo"; and again: "The insurance covers all goods laden on board the ship . . . . during the course of the voyage, provided the clause to touch at ——— has been stipulated." [123] So the rule is that a marine policy on goods and merchandises generally covers shifting or successive cargoes loaded on board the same ship in the course of the same voyage in substitution of the original cargo; as in case of a trading voyage out and home, and substituted goods loaded at intermediate ports. The character of the traffic or produce or goods changed may differ, and yet, according to the course of such trading voyage, constitute one continued subject matter of insurance under the name of "goods" or "merchandises." [124] And the same rule applies where by the description of the subject matter the policy indicates that a trading voyage is contemplated, although not expressed.[125]

§ 1733. Goods or Merchandise—Shifting and Successive Goods—After-acquired Property—Fire Risks.—If a fire policy is effected upon a stock of goods or merchandise to be sold and replenished, and which is fluctuating in character, or the property is of a particular class, or is constantly changing in value, goods successively in stock, consisting of additions made from time to time after the policy is effected, are covered, for the insurance in such cases is not confined to the particular goods or merchandise in stock when the policy was effected; but where the nature of the risk, the character of the property, and business usages so indicate, it will be held that the insurance covers the goods or merchandise of the character and description or class specified on hand or in stock at the time of loss, not exceeding the amount insured. This rule arises not only from the principles of indemnity, but also accords with the rules of construction whereby the policy is to be given

[123] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, pp. 237-39.

[124] Hill v. Patten, 8 East, 377, per Lord Ellenborough. See Tobin v. Hartford, 34 L. J. Com. P. 37; 13 Com. B., N. S., 791; 32 L. J. Com. P. 134; Crowley v. Cohen, 3 Barn. & Adol. 478.

[125] See sec. 1569, herein.

effect, so far as possible, in accordance with the manifest intentions of the parties, and also to make the protection the policy affords coextensive with such intent, so far as is consistent with the words used and the risk assumed.[126] And in case of an insurance upon live-stock on the premises, the policy is not avoided by the fact that the horse killed was acquired by assured, after the policy issued, by exchange for horses then on the premises.[127]

§ 1734. What Goods are Covered may be Determined by Custom between the Parties.—A custom between the parties may determine what goods are covered by the policy. Thus all goods consigned may be covered by an open policy, in the absence of a reservation to the contrary expressed in the bill of lading, where such is the custom between the parties.[128]

§ 1735. What Goods are Covered may be Determined by Known Usage of a Particular Place.—A usage of a particular place governing the mode of shipping goods and of effecting insurances upon the same, and under which shipments are rarely known either to the consignee or the insured until the arrival of the vessel, and which is so well known among merchants that the underwriters are bound to take notice thereof, will bind them, and goods insured in accordance with such custom will be covered.[129]

[126] American Central Ins. Co. v. Rothschild, 82 Ill. 16; City F. Ins. Co. v. Mark, 45 Ill. 282; Whitwell v. Putnam F. Ins. Co., 6 Lans. (N. Y.) 166; Cower v. Ocean Ins. Co., 19 La. 28; Hoffman v. Ætna F. Ins. Co., 32 N. Y. 405; 88 Am. Dec. 337; Sawyer v. Dodge Mut. Ins. Co., 37 Wis. 504; Hooper v. Hudson River F. Ins. Co., 17 N. Y. 424; British-American Ins. Co. v. Joseph, 9 L. C. Rep. Q. B. 448; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; 80 Am. Dec. 573; Perry Co. Ins. Co. v. Sewart, 17 Pa. St. 45; Butler v. Standard F. Ins. Co., 4 Abb. N. C. 391; Cromwell v. Portsmouth F. Ins. Co., 26 N. H. 289; Lane v. Maine Ins. Co. (3 Fairf.), 12 Me. 44; Mills v. Farmers' Ins. Co., 37 Iowa, 400; Planters' Ins. Co. v. Engle, 52 Md. 468.

[127] Mills v. Farmers' Ins. Co., 37 Iowa, 400.

[128] Bramstein v. Crescent Mut. Ins. Co., 24 La. Ann. 589.

[129] Hartshorne v. Union Mut. Ins. Co., 36 N. Y. 172; 5 Bosw. (N. Y.) 538; Pratt v. Union Mut. Ins. Co., 9 Bosw. (N. Y.) 100; citing Hartshorne v. Union Mut. Ins. Co., 5 Bosw. (N. Y.) 538.

§ 1736. Goods or Merchandises to be Described by Indorsement—Approval of Risks—Goods to be Thereafter Declared and Valued—Marine Risks.[130]—It is no doubt perfectly competent to effect insurances on goods, merchandises, or property agreed to be subsequently declared or indorsed upon the policy or otherwise, and the policy may be open or valued, or what is known as a "running policy." These policies are differently framed; they may be upon such sums or property from such places and on board such vessels as shall be agreed upon and indorsed; or they may stipulate that no shipments are to be considered or be binding until approved and indorsed; or that risks are to attach from the time of shipments, which are to be reported to insurers on receipt of invoices for indorsement; or that all sums or the various sums at risk be indorsed, or that the risks applicable be reported to the underwriter for indorsement as soon as known to the assured; or that indorsements on the policy are to be evidence of property at risk; or the premium on risks may be stipulated to be fixed at the time of indorsement; or other words of similar import.[131] Although a policy of this character may be practically a new and separate insurance upon each successive parcel of goods as indorsed,[132] nevertheless the object or purpose of such insurances is to afford protection under a general policy upon expected shipments by indorsements, and thus protect all merchandises of the assured at risk, instead of effecting a par-

[130] See sec. 1576, herein.

[131] See Neville v. Merchants & Manufacturers' Ins. Co., 19 Ohio, 452; 17 Ohio 192; Da Costa v. Frith, 4 Burr. 1966; Schaefer v. Baltimore M. Ins. Co., 33 Md. 109; Jameson v. Ralli, 6 El. & B. 422; Kewley v. Ryan, 2 H. Black. 343; Marx v. National M. & F. Ins. Co., 25 La. Ann. 39; Donville v. Sun Mut. Ins. Co., 12 La. Ann. 259; Gledstanes v. Royal Exch. Assur. Co., 5 Best & S. 797; 34 L. J. Q. B. 30; Protection Ins. Co. v. Wilson, 6 Ohio St. 553; Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.), 214; Langhorne v. Cologan, 4 Taunt. 330; Wells v. Pacific Ins. Co., 44 Cal. 397; Edwards v. St. Louis Perpetual Ins. Co., 7 Mo. 382; Kennebec Co. v. Augusta Ins. etc. Co., 6 Gray (Mass.), 204; Harman v. Kingston, 3 Camp. 150; Orient Mut. Ins. Co., 20 Pa. St. 312. Nearly all the above cases are noted in the text of this section.

[132] Hartshorne v. Shoe & Leather Dealers' Ins. Co., 15 Gray (Mass.), 240; Donville v. Sun Ins. Co., 12 La. Ann. 159.

ticular policy upon each shipment; and again, the nature and kind of the goods to be shipped may not be known, or it may not be known that the goods are shipped until after the loss, as in case of goods expected from abroad. In many of the decisions the principal point involved is whether the contract has been completed. Other questions, however, are whether the indorsement may be made after loss; whether the underwriter is obligated to indorse shipments or give his approval; whether he has a right to reject a declaration, etc. The wording of the contract must necessarily affect its construction and the relative rights of the parties. The effect of these contracts will, however, be seen from the cases following in this section.[133] In an Ohio case[134] the policy was an open one on such sums and property from such places and on board such vessels as should be mutually agreed upon between the parties and indorsed upon the policy. The point involved was whether there was a completed contract, there being a modification of the value to be insured, and it was held that there was to be no acceptance of the modification. Again, it is held obligatory upon the underwriters to indorse the shipments notwithstanding the loss where they are notified within a reasonable time after the shipment and the insured acts in good faith, although in such cases the insured cannot, as to any shipments made by them and coming within the conditions of the policy, wait until he hears that the ship is lost or in peril and then elect, and in such cases, upon notification of the insured to the office of the underwriter, the insurance takes effect from the shipment, and covers the goods lost or not lost.[135] In a Maine case the insurance was under an open running policy "lost or not lost" to a specified sum on property on board vessel or vessels, "with such other risks as may be agreed as per indorsement herein accepted by this company." The nominal assured, by virtue of an authorization by the underwriter, indorsed a risk and filled out a blank certificate in favor of the plaintiff

[133] See, also, cases cited in the first note in this section.

[134] Neville v. Merchants & Manufacturers' Ins. Co., 19 Ohio, 452; overruling 17 Ohio, 192.

[135] Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.), 214.

to a specified sum on certain merchandises on a named vessel, designating the place from and the destination, and received the premium. The court decided that the contract was completed.[136] In another case, however, the policy was upon property "lost or not lost on board vessel or vessels," etc., all sums at risk to be indorsed upon the policy and valued at the sum indorsed at such a per cent as should be specified against each indorsement. The underwriter refused to indorse on the ground that a loss had occurred, and it was held that the agreement was to effect a new and separate insurance on successive shipments by indorsement and an agreed-upon rate of premium, and therefore the consent of both parties was necessary, and there was no completed contract.[137] If the policy provides for an insurance upon "such property in such sums," etc., as may be approved "and entered in the book attached to this policy," and that the risk shall not be binding "until so approved and entered," the goods are properly described by indorsement and entry in accordance with the stipulations of the contract, and are covered by the policy by the entry made as specified by the insurer or his authorized agent.[138] In another case the stipulation was that shipments were not to be "considered insured until approved and indorsed on this policy" by the underwriter, "indorsements valued at the same, provided they do not vary from the cost more than" a certain per cent. Indorsements were customarily made of the shipments, and shortly thereafter, upon receipt of the invoices, the value and rate were filled in. After the vessel was overdue it was discovered that, owing to a mistake in writing in an indorsement, the value of the goods shipped was not stated, and it was declared that the insurers were not then obligated to indorse the same, and were not liable.[139] Where treasure and

[136] Massachusetts v. Maine Mut. M. Ins. Co., 61 Me. 537.

[137] Hartshorne v. Shoe & Leather Dealers' Ins. Co., 15 Gray (Mass.), 240.

[138] Marx v. National M. & F. Ins. Co., 25 La. Ann. 39. "No risk was to be binding till approved and entered. When this was done, the contract of insurance became operative, and it covered the property, whether lost or not lost, at the time of the abandonment," per Wyley, J.

[139] Schaefer v. Baltimore M. Ins. Co., 33 Md. 109.

bullion to be shipped by W. was insured under an open or running marine policy, the various sums to be indorsed thereon, and risks applicable to be reported to the company for indorsement as soon as known to the assured, the policy to attach from the loading thereof on board at specified ports, it was held that treasure on board at one of the specified ports was covered, and that the company was liable although a loss had occurred and was known to the parties before indorsement; although it was said in this case that it was the duty of the insured to report the amount of shipments as soon as the fact became known to the insured, without regard to the sources of information.[140] It is declared by a learned writer that if the assured effects a policy on goods to be thereafter declared and valued, as in case of goods expected from foreign ports, and the kind and amount are unknown to the assured, and since he may have no knowledge thereof before the loss, it is not obligatory upon him to declare the same before the loss, although the effect of not so declaring will be to make the policy an open, and not a valued, one.[141] It will be observed that the wording of the clause relating to indorsement is the point upon which rests the determination of the relative rights of the parties, and that in most of those cases where the decision was adverse to the claim of the insured it depended upon the fact that the contract lacked some essential necessary to its completion, or that the insured had failed to fully comply with what the court by its construction of the requirements of the policy deemed some condition precedent. Thus, in one case the modification of the value was not accepted; in others the premium was not fixed, or being fixed the terms were not accepted or the premium had not been paid or secured. Some of the cases seem to have been arbitrarily decided, and out of these arbitrarily made decisions arises a conflict with those cases wherein the courts have endeavored to follow principle and precedent.

[140] Wells v. Pacific Ins. Co., 44 Cal. 397.

[141] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 327, *321; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 315; citing Crawford v. Hunter, 8 Term. Rep. 10, n.

§ **1737. Gunpowder—Marine Risk.**—Where gunpowder forms a part of the cargo, and is an article notoriously suitable to the market where it is destined, it will be covered by a policy indorsed "cargo," and which makes no exception as to gunpowder, and such article is "lawful goods and merchandise" under such policy.[142] It is pertinent to this rule to note that the decision rests upon a principle differing from that wherein certain specified articles generally known as "hazardous" or "extra-hazardous" are excluded by a provision in the policy from its protection, and where the rule would obtain that the enumeration of designated articles as those which cannot be kept amounts to a consent that all others may be kept.

§ **1738. House or Building—Dwelling-house**—The word "house," as used in a policy of insurance, embraces everything appurtenant and accessory to the main building and which is a part and parcel thereof, even though separated therefrom.[143] An incubator building used for the sole purpose of hatching chickens is not a "farm building" within the meaning of those words, as used in a statute prohibiting insurances in mutual fire companies on any property other than detached buildings and farm buildings.[144] So a hog-pen and hen-house, covered with boards and neither shingled nor battened, are not a building under a representation that there are no buildings within a specified distance of the property insured.[145] So it is held competent to show by the testimony of builders whether struc-

[142] Lapene v. Sun Ins. Co., 8 La. Ann. 1. "We think there is nothing in another ground of defense urged in this court, viz.: That the risk was unduly enhanced by there being gunpowder among the plaintiffs' goods. The invoice shows that some twenty kegs of powder were on board. We do not find any exception in the policy as to gunpowder. It is construed in the general laws, 'lawful goods and merchandise,' under which the plaintiffs insured, and is an article notoriously suitable to the market to which the cargo was destined. It clearly comes within the word 'cargo,' which was indorsed on the policy," per Eustis, C. J.

[143] Workman v. Insurance Co., 2 La. (O. S.) 507; 22 Am. Dec. 141.

[144] O'Neil v. Pleasant Prairie Mut. F. Ins. Co., 71 Wis. 621, under Laws Wis. 1885, c. 421, sec. 2.

[145] White v. Mutual F. Assur. Co., 8 Gray (Mass.), 566.

tures are "brick buildings."[146] If a house is described as a "brick building," the fact that a wall which had settled has been replaced by wood does not make it a misdescription.[147] The insurance upon a building applies to the structure as such, so much so that if it loses its distinctive character and ceases to exist as a building through some agency other than that of the peril specified in the policy, it at that moment loses the protection offered by the insurance. The materials existing separately or in some other form do not constitute the building.[148] But after a building has been partly destroyed by fire and in that form is again insured as a building, the company cannot avoid liability under a claim that the property insured was not a building at the time the policy was issued, nor can it successfully defend on the ground that the total loss resulted from both fires.[149] A building with a granite front only and three stories high in the front and rear and one story high in the middle is a "three-story granite building" within the meaning of those words in a policy.[150] An insurance, however, upon a stone dwelling-house does not cover a house partly wood and partly stone.[151] So a policy upon a "frame building and additions thereto with a shingle roof," occupied "as a dwelling," covers a carriage-house under the same shingle roof used for keeping therein carriages and horses, and also having a room over the carriage part which was occupied by a servant, said "carriage-house" being separated by a plain board partition from the woodshed, which connected it with the kitchen.[152] A "one-story" building covers a story and a half.[153] A cellar mentioned in the application is covered, although not described in the policy, if the policy makes the application a part there-

[146] Mead v. Northwestern Ins. Co., 7 N. Y. 530.

[147] Gerhausen v. North British & Mercantile Ins. Co., 7 Nev. 174.

[148] Nave v. Home Mut. Ins. Co., 37 Me. 430.

[149] Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103.

[150] Medina v. Builders' Mut. F. Ins. Co., 120 Mass. 225.

[151] Chase v. Hamilton Ins. Co., 20 N. Y. 52; 22 Barb. 527 (two judges dissenting).

[152] Hannan v. Williamsburgh City F. Ins. Co., 81 Mich. 561; 45 N. W. Rep. 1122.

[153] Eakin v. Home Ins. Co., 1 Tex. Civ. Cas., secs. 1234, 1235.

of,[154] otherwise a cellar will not be considered as a story of the house.[155] The dwelling-house of the insured may mean only one room in which he lives.[156] But if a building is described as "occupied as a machine-shop," when in fact it is occupied for a purpose which makes the risk greater, as where it was actually occupied as an organ factory, the property will not be covered;[157] nor does a policy upon "buildings and fixtures" cover furniture.[158] Where the building is described as "standing detached," it will cover a building seven feet away from other buildings, and the words "standing detached" may not be shown to mean buildings at a greater distance.[159]

§ 1739. Houses and Buildings—Connected Structures and Additions.—The policy may by express terms include connected buildings, structures, or additions; or the term "building, factory, or warehouse" may by implication include other buildings or structures so connected with the main building as to be actually a part thereof, and in the case of factories or other buildings devoted to particular uses, it may be evident that certain connected buildings were neecssary to the continued occupation of the main building, and were therefore evidently contemplated as included in the description as a part of the property intended to be insured, and so under certain circumstances parol evidence will be admitted that connected buildings were intended to be included. Thus, where a policy was effected upon a brick building used as a "tobacco factory and warehouse," it was held competent to show by parol evidence that the policy was intended to include a room which was connected with the main building by bridges and used as a part of the factory.[160] So insurance on a grain "elevator, buildings, and additions" will extend to and include

[154] Menk v. Home Mut. Ins. Co., 76 Cal. 50; 18 Pac. Rep. 117; 14 Pac. Rep. 837.

[155] Benedict v. Ocean Ins. Co., 31 N. Y. 389.

[156] Friedlander v. London Assur. Co., 1 Moody & R. 171.

[157] Goddard v. Monitor Ins. Co., 108 Mass. 56.

[158] Holmes v. Charlestown M. & F. Ins. Co., 10 Met. (Mass.) 211.

[159] Hill v. Hibernia Ins. Co., 17 N. Y. Supr. Ct. 26.

[160] Harris v. Ætna Ins. Co., 1 Cinc. (Ohio) 361.

a building through which all the grain is received into or discharged from the warehouse, although such building is only attached to the elevator proper by boards nailed to both structures and they are two and a half feet apart.[161] So a building described as a "car factory," the policy being upon goods therein, includes goods in a wing connected with the main building by an opening through the wall usually closed by an iron door, where both the wing and main building are known as the car factory and are both used for manufacturing cars.[162] So a policy on a brick store will include a wooden shed or awning projecting over the sidewalk supported on pillars sunk into the ground on the farther side and having rafters extended into the brick wall of the building.[163] And the term "one building" in a policy will include an entire structure under one common outer wall which is under one management and control and devoted to the same use, although it is a warehouse five stories high, divided into three compartments on each floor by two main partition walls, with doors eight feet square connecting the several compartments on each floor; and a custom of a particular place to class certain stories as distinct buildings and risks will not bind the parties to an insurance effected in another place in the absence of proof that the custom was known to said parties.[164] So an engine-room and its contents located at a distance of twenty-two feet from the mill, connected therewith by a shaft for transmitting power and by a spout for carrying shavings, is covered by a policy upon a planing-mill and addition and machinery therein, especially where there is no evidence of any other addition, and even though there be a roadway separating the buildings.[165]

§ 1740. Household Furniture — Hotel Furniture.— Household furniture," in the absence of restrictive words in the

[161] Cargill v. Millers & Manufacturers' Mut. Ins. Co., 33 Minn. 90. See, also, Pettit v. State Ins. Co. (Minn.), 43 N. W. Rep. 378.

[162] Blake v. Exchange etc. Ins. Co., 12 Gray (Mass.), 265.

[163] Commercial F. Ins. Co. v. Allen, 80 Ala. 57; 1 S. Rep. 20.

[164] German-American Ins. Co. v. Commercial F. Ins. Co., 95 Ala. 469; 21 Ins. L. J. 626; 11 S. Rep. 117.

[165] Home Mut. Ins. Co. v. Roe, 71 Wis. 33; 36 N. W. Rep. 594 (annotated case).

policy, covers goods, vessels, utensils, and such other articles and property which are reasonably necessary, useful, and convenient for housekeeping.[166] And in marine policies household furniture may sometimes be covered under the designation of "cargo."[167] So insurance upon a hotel and its furniture covers furniture stored and being used in the business of the hotel, and the latter is not within the exception in the policy of "goods held on storage."[168] And within the same principle furniture in a dwelling-house describes and covers goods stored in the attic and occasionally used when needed in the house.[169]

§ **1741. Live-stock—Marine Risks.**—Live-stock is not included under the general description of "cargo" or "goods," for such property is the subject of particular insurance, except in case of a usage to that effect.[170] Such property is,however, generally insured in England by a declaration in the policy specifically describing such property by kind and number of each kind shipped, or by a specific valuation of the property as such under an annexed statement made a part of the policy.[171] And as a rule, in this country such property ought to be particularly represented to the underwriters and described in the policy, as such a rule requiring such specific designation would at least seem reasonable, for the underwriter is entitled to know the extent of the risk he assumes.[172]

§ **1742. Locality Important in Fire Risks.**—As a rule, locality and place are essential, but in determining how far locality is important in describing the property insured refer-

[166] Reynolds v. Iowa & N. Ins. Co., 80 Iowa, 563; 46 N. W. Rep. 659.

[167] Vassee v. Ball, 2 Dall. (U. S.) 270.

[168] Continental Ins. Co. v. Pruitt, 65 Tex. 125.

[169] Clarke v. Firemen's Ins. Co., 18 La. (O. S.) 431.

[170] Allegre v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Chesapeake Ins. Co. v. Allegre, 2 Gill. & J. (Md.) 164.

[171] Lawrence v. Aberdeen, 5 Barn. & Ald. 107; Gabay v. Lloyd, 3 Barn. & C. 793. See Brown v. Stapylton, 4 Bing. 119.

[172] See Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 434, per Putnam, J., and cases cited under first note to this section. For insurance of live-stock under fire risks, see sec. 2791, herein.

ence must be had to the character of the property, to a consideration of what is the primary object in effecting the insurance, and also to the fact to what uses the property insured would in all reasonable probability be put. So usage may be a controlling factor in the matter, as may also be the fact, in the case of certain kinds of property, whether the removal thereof is permanent or temporary. Where the policy is upon a class of property the risk upon which, from its particular character, depends so much upon place or location that the same constitutes an essential element of the contract; as in the case of a stock of goods or furniture "contained in" a specified building, then such property will, as a rule, not be covered, if changed or removed to another place or locality. The insurer for various reasons in cases of this character might refuse to accept the risk altogether, or might accept it at an enhanced premium if he had known that its location was other than that designated, and the right of the insurer to know exactly what risk he is undertaking cannot be denied. But if the primary object is to insure the property described, and the character of the property is such as to warrant that presumption, then its exact location may be a subordinate matter of more or less importance.[173] The above distinctions will, however, clearly appear from an examination of the cases under this and the sections next following. A policy upon a house insured as the house of A on a certain road does not cover a house of A located in another place, although he resided in the latter place and the agent supposed that he was insuring the house in which he resided.[174] So where the property is specified as located in a certain building, it is not covered if situate in an adjoining building, nor can the policy be reformed so as to protect such goods so located.[175] A policy upon an oil-

[173] Bradbury v. Fire Ins. Assn., 80 Me. 396; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543; Lyons v. Providence-Washington Ins. Co., 14 R. I. 109; 51 Am. Rep. 364; Towne v. Fire Assn., 27 Ill. App. 433; Severance v. Continental Ins. Co., 5 Biss. (C. C.) 156; Sampson v. Security Ins. Co., 133 Mass. 49; Hans v. Fire Assn., 114 Pa. St. 431; McCluer v. Guard F. & M. Ins. Co., 48 Iowa, 349.

[174] Mead v. Westchester F. Ins. Co., 3 Hun (N. Y.), 608.

[175] Severance v. Continental Ins. Co., 5 Biss. (C. C.) 156.

mill for crushing linseed and grinding dyewood, and upon fixed machinery and grinding gear therein, and which also insures one logwood house in which chopping dyewood is performed, does not cover machinery and gear in the logwood house.[176]

§ **1743. Locality—Property "Contained in."**—A policy on merchandise "contained in letter 'C,' Patterson stores," does not cover goods in the same building in section "A," said stores consisting of a warehouse divided into sections by fireproof walls designated by letters of the alphabet, such description of locality being a warranty.[177] So an insurance upon a brick "pottery building" and upon machinery, stock, etc., "contained in said building, situate" on D street near the F. railroad, covers only the pottery building and its contents.[178] If a policy describes the property as contained in a building of a certain kind, parol evidence may sometimes be resorted to to determine whether the building answers the description.[179] So goods insured as being in "the store part" are not covered when located elsewhere,[180] and goods in a tavern are not goods in a "store."[181] Goods described as in a building used as a furnace-house in the rear of number 82 on a specified street are held not covered when in a storehouse in the rear of numbers 82 and 84 of said street.[182] In a policy on goods "contained in" a house at a specified number on a certain street, the exact locality is important.[183]

§ **1744. Locality—Property "Contained in" Connected or Adjoining Buildings—New Buildings Substituted for Old.**—The property may be so described that it is evi-

[176] Hare v. Barstow, 8 Jur. 928.

[177] Bryce v. Lorillard F. Ins. Co., 55 N. Y. 240; 46 How. Pr. (N. Y.) 498; 3 Jones & S. 394; 14 Am. Rep. 249.

[178] Hews v. Atlas Ins. Co., 126 Mass. 389.

[179] Medina v. Builders' Mut. F. Ins. Co., 120 Mass. 225.

[180] Boynton v. Clinton etc. Ins. Co., 16 Barb. (N. Y.) 254.

[181] Prudhomme v. Salamander Ins. Co., 27 La. Ann. 695.

[182] Eddy St. Foundry v. Camden Stock & Mut. Ins. Co., 1 Cliff. (C. C.) 300.

[183] Lyons v. Providence-Washington Ins. Co., 14 R. I. 109; reversing 13 R. I. 347.

dent from the character of the risk or the nature and uses of the property that it was intended that the insurance should extend to and cover property in connected or adjoining buildings. This is especially true in cases of insurances upon manufactories and their contents, or where the buildings are used in a special business, and are so constructed with reference to the particular purpose for which they were intended that although they are separate structures, yet together they constitute one structure within the intent of a description in an insurance policy. Manufactories and structures of the latter class are generally within one inclosure, or so connected with each other that the one is in reality a part of the other, both being used together for a common purpose, the use of the property in one being necessarily incident to the use of that in the other.[184] Thus, where the property was described as a "frame steam saw-mill" situate, etc., "boiler, engine, machinery, and belting contained therein," the insurance covers a planing machine in the building twenty-five feet distant from the other machinery, but located upon the same floor, connected therewith by belting and plainly visible.[185] So grain in an elevator covers grain in an adjacent annexed building, both being connected by passage-ways and operated as one elevator.[186] And in the case where "chair, lumber, and such other stock as is usually used in a chair factory" was insured as "contained in" a designated factory situate, etc., it was held that chair material was included, although in an engine-house ten feet in the rear, but connected by a platform eight feet wide and by belting. The chair material was in a drying-room in the second story of the engine-house.[187] Where a policy described the property as "contained in" a new frame barn, wagon, and wareroom sit-

[184] See Liddle v. Market etc. Ins. Co., 4 Bosw. (N. Y.) 179; Blake v. Exchange Ins. Co., 12 Gray (Mass.), 265; Sampson v. Security Ins. Co., 133 Mass. 49, and cases next cited under this section.

[185] James River Ins. Co. v. Merritt, 47 Ala. 387.

[186] Pettit v. State Ins. Co., 41 Minn. 299; 43 N. W. Rep. 378. See, also, Cargill v. Millers & Manufacturers' Mut. Ins. Co., 33 Minn. 90.

[187] Liebenstein v. Baltic F. Ins. Co., 45 Ill. 301; Liebenstein v. Metropolitan F. Ins. Co., 45 Ill. 303. Contra, Liebenstein v. Ætna Ins. Co., 45 Ill. 303.

uate, etc., it was held not to cover goods and merchandises contained in a brick addition to the storeroom erected after the policy was issued, although such addition covered a place where part of the barn had stood at the time the insurance was effected, and which part had been removed for the additional structure.[188] Again, where the primary object is to insure property described within certain limits, its exact location is a subordinate matter.[189]

§ 1745. Locality—"Contained in"—Goods in Different Parts of Building.—If there is nothing in the policy nor in any plan or other paper constituting a part of the contract to show that the description was intended to limit the location of the property insured to a particular part of the building, it will not be so limited, and a clause providing against removal of the goods will not in itself be sufficient to constitute such a limitation, and this rule applies even though the property be placed and located in stores in said building other than those in which they were situate when the policy was issued.[190]

§ 1746. Locality—"Contained in"—Removal of Goods from a Specified Location—Permanent Removal.—If from the terms of the policy or by reason of the plan or other paper constituting a part of the contract it is evident that the description was intended to limit the location of the property insured to a particular part of the building, it will be so limited. Thus, where the policy is upon goods "in the store part," they are not covered when removed to the second and third stories of the building, said locality not being the "store part."[191] Nor are goods, insured as "contained in" a dwelling-house, covered when removed to a barn.[192] So tools, pumps, etc., described

[188] Lycoming F. Ins. Co. v. Updegraff, 40 Pa. St. 311.

[189] Meadowcraft v. Standard Ins. Co., 61 Pa. St. 91.

[190] Fair v. Manhattan Ins. Co., 112 Mass. 320; West v. Old Colony Ins. Co., 9 Allen (Mass.), 316.

[191] Boynton v. Clinton & Essex Mut. Ins. Co., 16 Barb. (N. Y.) 254.

[192] English v. Franklin Ins. Co., 55 Mich. 273. "It is claimed for the plaintiff that the barn in this case may be considered a part of

as "contained in" a certain building situate, etc., are not protected by the policy when removed to another building thirty feet away.[193] And the words "contained in" as applied to rolling stock of a railroad company in car and engine houses are not merely descriptive of the cars and engines covered, but are words of limitation intended to limit the risk on that property to the time during which they are actually within the car and engine houses.[194] The rule above stated is especially applicable to cases where it is evident that the removal is intended as a permanent one, as is clearly illustrated by a case of removal of household goods from the place where located when insured to another residence, there to be used by the insured.[195]

§ 1747. Locality—Temporary Removal of Property from Specified Location.—In considering the effect upon the risk of a removal, an important consideration is that of the character of the property, and the uses which it must be presumed it was contemplated that the property would in all reasonable probability be subjected to during the period of insurance, and in connection with this fact another point is involved, and that is, whether the removal is permanent or tem-

the dwelling-house, it being within the curtilage. But there is no ground for this claim. This is a case of contract, and the question is what contract the parties have made. For some purposes the law regards a barn within the curtilage as part of the dwelling-house, but it is not properly so regarded, and it must be very rare indeed that in a contract it is treated as such. It certainly was not so treated in this case. There were two classes of insured property, and the class to which the goods in question belonged was insured as situated in a described building, which the policy designates as the dwelling-house, and the description makes it very clear that no other building was understood to be included. The parties certainly did not understand that in insuring the household goods, etc., in the dwelling-house, and also horse, buggies, etc., and barn tools, that the horse, buggies, and barn tools were in the dwelling-house. . . . . We find the contract to be that defendant will be responsible for the loss by fire of these goods while they remain in the dwelling-house, but not when out of it," per Cooley, C. J.

[193] Harris v. Canadian Ins. Co., 58 Iowa, 236.

[194] Annapolis etc. R. R. Co. v. Baltimore etc. Ins. Co., 32 Md. 57.

[195] Lyons v. Providence-Washington Ins. Co., 14 R. I. 109; reversing 13 R. I. 347.

porary. But the mere fact that the removal is a temporary one, when its character and use does not warrant it, ought not of itself to protect property insured when removed and situate at the time of loss in another place than that specifically designated. In marine risks usage may become another important factor in determining the right to change a designated locality. Thus, furniture temporarily stored and situate at the time of the loss in a building other than that designated is not covered.[196] But wearing apparel which with other articles is insured as contained in a certain "dwelling-house," and which in the course of its ordinary use and while being worn away from the premises is destroyed or damaged, has been held to be covered by the policy.[197] So a ship's furniture which is temporarily placed on shore in a storehouse while the ship is being repaired is covered under a usage warranting such temporary removal.[198] But the temporary removal of cars and engines from car and engine houses, even for a regular trip upon the road, will not protect them where the policy limits the risk by the words "contained in" such buildings.[199] There are several cases wherein the courts have considered the character of the property and the use contemplated, and have held that horses have been covered by the policy although not in

[196] English v. Franklin Ins. Co., 55 Mich. 273; 21 N. W. Rep. 340.

[197] Longueville v. Western Assur. Co., 51 Iowa, 553; 33 Am. Rep. 146. "The words 'contained in the two-story frame dwelling,' etc., are words of description of the property insured, indicating the place of deposit when not in ordinary use. The character of the property insured must be considered in determining the true construction of the policy. The household furniture is used only in the dwelling. It is proper to infer that the parties to the contract intended the risk should attach to it only when in the building specified. But wearing apparel, when used, must of necessity be worn sometimes away from the dwelling. Of course, the use of the apparel away from the dwelling must be an ordinary use, and the dwelling must be the place of deposit for the apparel when not in use. The policy, therefore, does not contemplate that the insured may take a journey or sleep away from his dwelling; thus, when the apparel is not worn, keeping it in a place of deposit other than his own dwelling," per Beck, C. J. See, also, Noyes v. Northwestern Mut. Ins. Co., 64 Wis. 415, and cases cited therein.

[198] Pelly v. Royal Exch. Assur. Co., 1 Burr. 341.

[199] Annapolis R. R. v. Baltimore F. Ins. Co., 32 Md. 37.

the place designated by the policy; as in a case where a horse was killed while being used in the ordinary course of business at a place other than that specified in the policy, even though the animal was purchased after the policy was issued.[200] And the same ruling was made when the horse was lost while in the barn of a hotel at which the insured had stopped overnight while hauling grain to market.[201] On a line with the cases above noted is a case where the policy was upon "carriages, buggies, hacks," etc., contained in "livery and sales stable," in which it was expressly decided that the words "contained in" could not be construed so as to exclude the use of the property reasonably contemplated by its very character, and that the words merely designated the place of usual deposit of the property when not in use or while being prepared for use, and therefore a carriage or hack at a repair shop, temporarily there for repairs, was covered.[202] And like decisions under similar facts have also been made in other states.[203] On the contrary, however, it is held in Maine that a policy containing a like description does not cover a hack in a repair shop one-eighth of a mile away for the temporary purpose of repair, the insurers not consenting to the removal.[204] Notwithstanding adverse decisions, reason and principle would seem to favor the rule that if the property is of such a character that it may be reasonably presumed that the insurer knew that it was contemplated that

[200] Mills v. Farmers' Ins. Co., 37 Iowa, 400; American etc. Ins. Co. v. Hans (Pa.), 11 Atl. Rep. 107. See, also, Hans v. Fire Assn. of Philadelphia, 114 Pa. St. 431; 7 Atl. Rep. 159; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543.

[201] Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494. But examine Wildey v. Farm Mut. F. Ins. Co., 52 Mich. 446. See Brught v. Springfield F. & M. Ins. Co., 34 Minn. 352; Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229. See, also, Everett v. Continental Ins. Co., 21 Minn. 76. But see Hans v. St. Paul F. & M. Ins. Co. (Pa.), 15 Atl. Rep. 915 (annotated case); Gorman v. Hand-in-Hand Ins. Co., 11 W. R. C. L. 224.

[202] Niagara F. Ins. Co. v. Elliott, 85 Va. 962; 9 S. E. Rep. 694; 18 Ins. L. J. 628.

[203] McCluer v. Girard Ins. Co., 43 Iowa, 349; 22 Am. Rep. 249, and note 253; 48 Iowa, 349; London etc. F. Ins. Co. v. Graves (Ky.), 12 Ins. L. J. 308.

[204] Bradbury v. Fire Ins. Assn. of England (and four other companies), 80 Me. 396; 6 N. E. Rep. 733; 15 Atl. Rep. 34 (annotated case).

the property would be used in the ordinary way in which property of a like character is generally used, and that the real and beneficial enjoyment of the same precludes any supposition that it would be kept at all times in one particular place, then the words "contained in" cannot exclude such property from the protection of the policy where it is temporarily removed for the use contemplated or for purposes which are an incident to such use, and language which would exclude such a construction ought to be very clearly expressed.

§ **1748. Locality—Property on Premises.**—If the property is described as being on certain premises, the word "premises" will limit the protection of the policy to the property within or upon the specified locality, except there be a usage warranting the conclusion that other property was intended to be covered, or unless the character and use of the property is such that the rule given under the last section will apply. The meaning, however, of the word "premises" may be limited or extended by the other clauses of the policy, or by a specific description of the property with which the word "premises" is clearly intended to be synonymous. Thus, where a certain building was insured as a "three-story brick, gravel-roof, hotel building" situate, etc., and known as the "Tremont House," and permission was granted to light "the premises" with gasoline, but that the same should not be "stored on the premises," it was held that the word "premises" was limited to the building itself, and did not extend to building lots outside of the hotel belonging to the insured, so as to prohibit him from depositing gasoline in reasonable quantities thereon for use in the hotel.[205] Property described as being situated in the rear of a building, situate, etc., covers all property of the kind specified which is on any part of the said premises.[206] But where an oil-tank was described as located on certain land, and at the time of the loss was situate in another place, to which it had been carried by floods, it was held to be covered by the

[205] Northwestern Mut. Ins. Co. v. Germania F. Ins. Co., 40 Wis. 446. See Sawyer v. Dodge Co. Mut. Ins. Co., 37 Wis. 503; Soli v. Farmers' Mut. Ins. Co. of Manchester, 51 Minn. 24; 52 N. W. Rep. 979.

[206] Eddy Street Foundry v. Farmers' Mut. F. Ins. Co., 5 R. I. 426.

policy.[207] The term "ship-yard," even though specifically designated by boundaries in the policy, may by usage extend to the yard actually used, and so cover timber lying on the sidewalks, even though designated as a "stock of ship timber in a ship-yard."[208]

§ 1749. Locality—Premises Owned and Occupied—Property on Wharf.—A wharf belonging to the assured will constitute their premises, so that a policy will cover a dredge-boat made fast thereto, said policy being upon "any property belonging" to the insured "on premises owned and occupied by them and situate on railroad premises."[209] And the same ruling was made as to cars standing at the extreme end of a wharf upon a track which by adoption had become a part of the company's line.[210]

§ 1750. Locality—Occupation, Ownership, or Use of Premises acquired Subsequently to Issuing Policy.—A policy insuring property "on premises used or occupied" by the insured means "used" or "occupied" at the time of the issuance of the policy, and not a use or occupation subsequently acquired.[211]

§ 1751. Manufactories—Factories—Mills.—A policy upon a manufactory, factory, mill, manufacturing establishment, and the like, includes whatever is essential and necessary or incident to a proper conduct of the business, whether the property be hazardous or otherwise, unless the same be expressly excepted from the protection of the policy.[212] So the insurance of a starch manufactory, including machinery and fix-

[207] Western etc. Pipe Lines v. Home Ins. Co. (Pa. 1892), 21 Ins. L. J. 24.

[208] Webb v. National F. Ins. Co., 2 Sand. (N. Y.) 497.

[209] Farmers' Loan etc. Co. v. Harmony etc. Ins. Co., 41 N. Y. (2 Hand.) 619; 51 Barb. (N. Y.) 33.

[210] Fitchburg R. R. v. Charlestown Mut. F. Ins. Co., 7 Gray (Mass.), 64.

[211] Providence etc. R. R. Co. v. Yonkers F. Ins. Co., 10 R. I. 74.

[212] Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485; Seavey v. Central M. F. Ins. Co., 111 Mass. 540; Home Ins. Co. v. Favorite, 46 Ill. 263; Phœnix Ins. Co. v. Favorite, 49 Ill. 259.

tures, will cover all fixtures and machinery necessary and incident to the process of manufacturing starch.[213] The words "mills and manufactories" will be construed according to common usage, nor will a strict and literal interpretation be given those words. A manufactory is not necessarily a place where articles are made by hand, nor is a "mill" limited to the designation of a place where something may be ground; nor does the fact that an article is made by hand in a certain building necessarily constitute that place a "manufactory" within the meaning of a prohibition of such buildings in an insurance policy.[214] The word "manufactory" is not necessary in all cases to cover machinery used therein, for it has been held to be covered by the words "mill building."[215] A steam flourmill driven by steam and furnished with the necessary machinery is a manufacturing establishment."[216] So a "steam sawmill" is a manufactory in the sense that machinery necessary to be used therein will be covered by a policy on such mill.[217] "Factory" may cover adjoining or connected buildings.[218] The wheels of a machine used for polishing are covered, though detached therefrom.[219]

§ 1752. Materials not Included in "Building"—Unfinished Vessel.—There is a distinction between materials as such and materials which have actually entered into the construction of buildings, structures, or vessels, and have become a part thereof. Materials so used lose their distinctive character as materials, and become, in a certain sense, identified with the particular structure, building, or vessel into the construction of which they have entered. But while materials exist as such they are not covered by a policy on a building, vessel, or structure, even though the latter be in an unfinished

[213] Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553.

[214] Franklin etc. Ins. Co. v. Brock, 57 Pa. St. 74.

[215] Brugger v. State Ins. Co., 5 Saw. (C. C.) 304; 4 Fed. Rep. 472; 8 Ins. L. J. 293.

[216] Carlin v. Western Assur. Co. of Toronto, Canada, 57 Md. 515; 40 Am. Rep. 440.

[217] Bigler v. New York Cent. Ins. Co., 20 Barb. (N. Y.) 635.

[218] See sec. 1744, herein.

[219] Pierce v. Genge, 108 Mass. 78.

state and the material is intended to be used in the completion of the same. So a policy on an unfinished house does not cover materials for finishing the house which are located in an adjoining building.[220] Nor are spars, blocks, cordage, and other articles necessary for building and equipping a vessel so far a part of the vessel as to be covered by a policy on the latter, or a general usage warranting such a construction of the policy.[221] This, however, is not the case of an insurance upon the building, structure, or vessel in an unfinished state, for under such a policy, as in the case of an insurance upon a "bark now being built," the risk attaches to and covers the same whatever its state of completion.[222]

§ 1753. Medals — Models — Specific Description — Standard Policy.—Medals and models are required to be specifically described under the Massachusetts standard fire policy.[223]

§ 1754. Money, Specie, Bullion, Coin, Treasure, Jewels. Money, specie, bullion, coin, treasure, jewels, and the like, are generally specifically described in marine policies, although the rule seems to be that a general policy on goods, wares, and merchandises will cover such articles although not specifically designated.[224] Money and jewels must, however, be specifically described under the Massachusetts standard fire policy.[225] The rule as stated by Emerigon is: "With regard to specie and jewels, where their transport is not prohibited, it suffices that a bill of lading is made for them in due form to cover

[220] Ellmaker v. Franklin F. Ins. Co., 5 Pa. St. 183; 6 Watts & S. (Pa.) 439.

[221] Mason v. Franklin F. Ins. Co., 12 Gill & J. (Md.) 468; Hood v. Manhattan Ins. Co., 11 N. Y. 532; reversing 2 Duer (N. Y.), 191, and citing Johnson v. Hunt, 11 Wend. (N. Y.) 135; Merritt v. Johnson, 7 Johns. (N. Y.) 473; Andrews v. Durant, 11 N. Y. 35; Ellmaker v. Franklin Ins. Co., 5 Binn. (Pa.) 183; 6 Watts & S. (Pa.) 439; Ferard on Fixtures, 9, note a.

[222] Mason v. Franklin Ins. Co., 12 Gill & J. (Md.) 468.

[223] Massachusetts Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.

[224] Da Costa v. Frith, 4 Burr. 1966; 1 Marshall on Insurance, ed. 1810, 320 a.

[225] Massachusetts Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.

them by a general insurance on cargo and goods," referring, of course, to marine risks.[226] Thus, goods and merchandise in such policies will cover specie dollars arising from the sale of the cargo insured; so also coin and doubloons to be expended for cargo at the port of discharge.[227] But money paid for the use of the vessel during an embargo is not covered by a policy on "cargo." [228] A policy on cargo containing a written clause on goods and specie, both or either, and which also contains a warranty against illicit or prohibited trade, covers the specie when the same is known to be prohibited,[229] although it is held that the insurer is not liable for the risk of clandestine exportation of precious metals intended to be used in clandestine trade.[230] An insurance on "treasure, bullion, and bonds laden or to be laden . . . . beginning the adventure from and immediately after the loading thereof" at certain specified ports, risks to be indorsed, covers the treasure from the time it is on board at any one of the specified ports for transportation.[231]

§ **1755. Paintings—Patterns—Specific Description—Standard Policy.** — Paintings and patterns are required to be specifically described under the Massachusetts standard fire policy.[232]

§ **1756. Passage Money.**—Passage money is not insurable as freight, so as to be covered by a policy on the latter, if there is any freight to which such a policy may be applied. But it has been declared, however, that whether "freight" includes passage money must depend upon the terms of the pol-

[226] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 243.

[227] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429. See Whiton v. Old Colony Ins. Co., 2 Met. (Mass.) 1. See Manning's Index to N. P. R., 2d ed., 165, re. 5.

[228] Penny v. New York Ins. Co., 3 Caines (N. Y.), 155.

[229] Seton v. Delaware Ins. Co., 2 Wash. (C. C.) 175.

[230] 1 Marshall on Insurance, ed. 1810, 320 a; citing 1 Magens, 10, sec. 15; Da Costa v. Frith, 4 Burr. 1966. See criticism in 1 Phillips on Insurance, 3d ed., 237, 238, sec. 432.

[231] Wells v. Pacific Ins. Co., 44 Cal. 397.

[232] Massachusetts Pub. Acts, pp. 713-15; Acts 1887, c. 214, sec. 60.

icy, and also upon the particular circumstances of the case. It is usual, however, to describe such subject matter as passage money, or to so otherwise designate it that it may be distinguished from freight of merchandise.[233]

§ 1757. Personal Effects—Money, Jewelry, etc.—Master's Effects.—In marine risks money, jewelry, and articles of personal property of like character which are not part of the cargo as articles of commerce, but attached to the person of passengers or owned by them, or otherwise part of their personal effects, are not covered by a general marine policy on goods, wares, or merchandises, for a policy on goods generally means merchandisable goods and those which are a part of the cargo.[234] Emerigon says: "If a passenger desires to effect insurance on his baggage, he will designate it in the policy, giving it a value."[235] So in a fire policy jewelry is not included under household furniture or wearing apparel.[236]

§ 1758. Personal Property—Wearing Apparel—Master's Clothes—Baggage.—Wearing apparel must be specifically described under the provisions of the Massachusetts standard fire policy.[237] Wearing apparel is, however, usually designated as such in fire policies. The master's clothes are not goods, wares, or merchandise within the meaning of those words in a marine policy.[238] And goods intended to be brought over in the trunks of a partner or employee of the house as baggage are not covered where nothing is agreed upon beyond the policy. "How, then, can it be construed to cover the loss of goods packed in the trunks of travelers not

[233] See sec. 1021, herein; Denoon v. Home & Colonial Ins. Co., 7 L. R. Com. P. 341; 26 L. J., N. S., 628.

[234] 1 Marshall on Insurance, ed. 1810, 320 a; 1 Phillips on Insurance, 3d ed., 238, sec. 435.

[235] Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 2, p. 243.

[236] Clary v. Protection Ins. Co., 1 Ohio, 227.

[237] Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.

[238] Duff v. Mackenzie, 3 Com. B., N. S., 16; 26 L. J. Com. P. 313; 1 Marshall on Insurance, ed. 1810, *319, *727 a; citing Brough v. Whitmore, 4 Term Rep. 206; Ross v. Hunter, and Ross v. Thwaite, 1 Park on Insurance, 20. See King v. Glover, 2 Bos. & P. N. R. 206.

subject to the payment of freight nor covered by bills of lading, nor stowed with the cargo, nor contained in covers or boxes commonly subject to entry at the customhouse? The company has a right to stand upon its written policy, and to say to the plaintiff, non in haec federa veni. The goods were not, in a legal sense, laden on board the Arctic," although they were to be declared and indorsed, and the invoices were not presented nor the premium offered until after the loss.[239]

§ **1759. Plate—Specific Description—Standard Policy.**—Plate must be specifically described as such under the provisions of the Massachusetts standard fire policy.[240]

§ **1760. Profits and Commissions.**—An insurance may be validly made on profits.[241] Profits should be specifically described, whether the property be insured under a marine or fire risk, and this rule is unquestionably the law in England.[242] "Lloyd's form of policy is adopted as usual by the insertion of the words 'profits' or 'commissions' in the margin; or in the valuation clause adopting or adapting the language of the clause according as the subject of the policy is valued or not." [243] A loss of tolls sustained by the insured on its road while a bridge is rebuilding is not covered by a policy on the bridge,[244] nor does a policy on a building cover a loss of profits during repairs.[245] But commissions and profits are held in Massachusetts to be covered by the words "proper-

[239] Donnville v. Sun Mut. Ins. Co., 12 La. Ann. 259, per Merrick, C. J. And see sec. 1736, herein.

[240] Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.

[241] Barclay v. Cousins, 2 East, 544.

[242] See sec. 682, herein, and cases; Lucena v. Crawford, 2 Bos. & P. N. R. 315; 5 Bos. & P. 269; Elmaker v. Franklin Ins. Co., 5 Pa. St. 183; Wright v. Sun F. Office, 3 Rawle & Man. 819; Sawyer v. Dodge Co. Ins. Co., 37 Wis. 403; Anderson v. Morrice, L. R. 10 Com. P. 609; Torn v. Smith, 3 Caines (N. Y.), 245, 249; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 228, *222; sec. 101; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 39.

[243] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 39, 40; citing Eyre v. Glover, 16 East, 218.

[244] Farmers' Mut. Ins. Co. v. New Holland Turnpike Road Co. (Pa.) 15 Atl. Rep. 563.

[245] Wright v. Pale, 1 Ad. & E. 621.

ty on board." [246] A policy on the ship does not cover profits, and the same is true of a policy on freight.[247] So if there be a usage to that effect, a policy on "goods" will cover profits.[248] Where an insurance was effected on "profits on rice," it was held that the policy only attached to the rice on board the ship when the voyage was abandoned, and not to the entire quantity which was purchased by the insured and expected to arrive.[249] In case of an insurance on profits under a valued policy on goods and an abandonment is made, and the insured takes the goods and sells them, it is held that he cannot recover profits lost.[250]

§ **1761. "Property."**—An insurance on "property" will cover property kept for use as well as for sale,[251] and it is held that it will cover a bona fide equitable interest, though the legal title be in another.[252] And the term "property" means all the insured property under a provision invalidating the policy if "the property shall hereafter become mortgaged or encumbered," so that a mortgage of a part only was held not within the condition.[253]

§ **1762. Provisions and Provender under Marine Risk.** Provisions on board for the use of the crew are part of the necessary furniture, stores, and equipment of the ship, and are covered by a policy thereon under the usual clause, or by a policy on "hull and outfit." [254] But this rule does not apply

[246] Holbrook v. Brown, 2 Mass. 280.

[247] Lucena v. Crawford, 2 Bos. & P. N. R. 315; 5 Bos. & P. 269.

[248] Pritchett v. Insurance Co. of North America, Yeates (Pa.), 461.

[249] McSweeney v. Royal Exch. Assur. Co., 14 Q. B. 634; 19 L. J. Q. B. 222; reversing 18 L. J. Q. B. 193.

[250] Torn v. Smith, 3 Caines (N. Y.), 245.

[251] Burgess v. Alliance Ins. Co., 10 Allen (Mass.), 221.

[252] Locke v. North American Ins. Co., 13 Mass. 61; Tyler v. Ætna Ins. Co., 12 Wend. (N. Y.) 507; 16 Wend. (N. Y.) 385. See sec. 1716, herein.

[253] Phœnix Ins. Co. v. Lorenz, 7 Ind. App. 266; 29 N. E. Rep. 604. As to "property on board," see Holbrook v. Brown, 2 Mass. 280, noted in sec. 2030, herein; Whiton v. Old Colony Ins. Co., 2 Met. (Mass.) 1, noted in sec. 1180, herein; Wiggin v. Mer. Ins. Co., 7 Pick. (Mass.) 271.

[254] Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 138, per Story, J.; Hill v. Patten, 8 East, 373, per Lord Ellenborough; Macy v. Whaling Ins.

to provisions consumed during the ship's detention by an embargo.[255] That such was the rule established by this case is evidenced by the words of Lord Kenyon and Butler in a later case.[256] A ship's provisions are also held not to be covered by a policy on goods or merchandises,[257] nor are provisions for passengers included, nor is a provender for live-stock included in a policy, either on ship or cargo and freight; these must be specifically designated.[258] Nor are provisions consumed by slaves on board a part of the cargo covered.[259]

§ 1763. Scientific Cabinets and Collections—Sculpture—Specific Description—Standard Policy.—Scientific cabinets and collections and sculpture are required to be specifically designated under the terms of the Massachusetts standard fire policy.[260]

§ 1764. Ship.—The English form of policy reads "upon the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture of and in the good ship and vessel called the ——." One of the several forms used here reads: "Upon his or their interest as —— in the body, machinery, tackle, apparel, and other furniture of the good —— called the ——."[261] Insurance on the body of the ship does not extend to cargo, goods or merchandise, even though at the time the policy on the ship is effected it be laden.[262]

Co., 9 Met. (Mass.) 364, per Hubbard, J.; Forbes v. Aspinwall, 13 East, 325, per Lord Ellenborough; Brough v. Whitmore, 4 Term. Rep. 208, per Lord Kenyon and Buller, J.; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, p. 234. See Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 6, p. 172, et seq.; Stevens on Average, 5th ed., 60.

[255] Robertson v. Ewer, 1 Term Rep. 127.

[256] Brough v. Whitmore, 4 Term Rep. 206.

[257] Ross v. Hunter, Ross v. Thwaites, Park on Insurance, 8th ed., 20, 23; 1 Marshall on Insurance, ed. 1810, *319 a, *727 a.

[258] Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 29, 48.

[259] Robertson v. Ewer, 1 Term Rep. 127, as construed by Buller, J., in Brough v. Whitmore, 4 Term Rep. 206.

[260] Pub. Stats., pp. 713-15; Acts 1887, c. 214, sec. 60.

[261] A San Francisco form.

[262] 1 Marshall on Insurance, ed. 1810, 320 a; Emerigon on Insurance, Meredith's ed. 1850, c. x, sec. 1, p. 234.

§ 1765. Ship's Stores and Outfits—What Ship Includes.—An insurance on the ship covers the hull and outfits, comprehending rigging, tackle, furniture, apparel, sails, cordage, armament, provisions for the crew, and in fact all that properly belongs to and which is necessary, appurtenant, and usual to it, reference being had to the character of the vessel and the trade in which she is employed, and the usage of that trade, and generally to what is usual and necessary for the navigation or voyage intended. So such charts, compasses, and chronometers belonging to the shipowner as are necessary for the safe navigation of the ship are covered where warranted by custom, and machinery of steamships are covered, although generally designated. In applying this rule, however, the requirements of a particular trade, as in the case of whaling or fishing voyages, may give to the word "outfits" a particular meaning, and exclude the necessary fishing stores from the protection of a general policy on the ship, and require a description of the several interests.[263] Emerigon says: "The rigging and apparel form part of the ship"; also that the French Ordonnance "permits insurance on the rigging, apparel, armament, and stores. By 'armament' is understood advances made to the crew, provisions and munitions of war, and all expenses incurred up to the departure of the vessel. All these are subject to daily diminution; but this is compensated by the freight the vessel earns"; and again: "The expression in the body embraces in its generality . . . . all that regards the ship, such as the hull of the vessel, its rigging and apparel, munitions of war, stores and victualing, advances to the crew, and all that has been expended in fitting it out."[264] But wages paid to hands that were of the crew, discharged at

[263] Forbes v. Aspinwall, 13 East, 325, per Lord Ellenborough; Brough v. Whitmore, 4 Term. Rep. 208, per Lords Ellenborough and Buller; Hill v. Patten, 8 East, 375, per Lord Ellenborough; Robertson v. Ewer, 1 Term. Rep. 127, per Lord Mansfield; Haskins v. Pickersgill, 3 Doug. 222; The Dundee, 1 Hagg. Adm. Rep. 109; Macy v. Whaling Ins. Co., 9 Met. 354; Gale v. Laurie, 5 Barn. & C. 156.

[264] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 7. p. 144; c. viii, sec. 6, p. 172; c. x, sec. 1, p. 234. And see c. x, sec. 2. p. 244, where he says the detail of the London policy "is superfluous—it is sufficient to say on the body."

a port of repair, and re-employed as ordinary workmen, are not covered by a policy on the hull of a steamboat on time.[265]

§ **1766. Ship's Boat or Launch.**—Emerigon says: "In practice, the ship's launch is comprised in the rigging and apparel of the ship, because it is absolutely necessary for the navigation. The same is the case with the smaller boats," and he is of the opinion that a policy on the ship includes the launch.[266] And the rule in England and in this country is that a policy on the body or hull of the ship includes the ship's boat carried in a way usual and necessary, although the English policy expressly designates it in the description clause.[267] But it may be shown, however, that the boat was slung or carried in an unusual way, calculated to extraordinarily increase the risk assumed by the underwriter.[268]

§ **1767. Ship—Character or Kind of Vessel—Rating.** A ship, according to the generally accepted meaning of that term, comprehends every species of vessel which navigates the seas. Emerigon, however, distinguishes in practice between the term "ship (vaisseau)" and "vessel (navire)," saying the former "includes only vessels with three masts," while the latter "comprehends every structure of carpentry fit for floating and making way on the water," including shallops, the smallest vessels, and even rafts, although he adds: "According to all our dictionaries the word 'ship (vaisseau)' is not less generic than 'vessel (navire)' "; and, referring to Cleirac, adds that that writer under the term "ship" includes "every species of ships, galleys, barques, and boats"; but he also says: "The words just mentioned receive the signification that usage in each country attaches to them. There cannot be established on this point any sure rule." [269] So far, however, as this dis-

[265] Webb v. Protection Ins. Co., 6 Ohio, 456.

[266] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 7, p. 144; c. x, sec. 2, p. 244.

[267] Blackett v. Royal Exch. Assur. Co., 2 Cromp. & J. 250; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472.

[268] Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472.

[269] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 3, p. 129, c. vi, sec. 6, p. 143, et seq. See 1 Marshall on Insurance, ed. 1810, *314.

tinction between ship and vessel is concerned in matters relating to insurances, its principal importance really goes to the question of representation or false description. It is true that the character of the ship or vessel is important, with relation to its capability of performing the voyage insured and to enable the insurer to judge the risk, and therefore affects the question of what degree of risk or hazard is assumed, and consequently the rate of premium, for ships are not all equally capable of performing a particular voyage, but there are other ways of identifying the ship or vessel, such as its name, and the name of the master, and the general term "ship" would ordinarily, in the absence of fraudulent misrepresentation, be sufficient. If there be a fraudulent misdescription calculated to mislead, it would avoid the policy; otherwise not.[270] So Emerigon says: "Care should be taken to announce in the policy the true character of the ship. It is true that if the insurers knew certainly upon what ship they were taking a risk it would little matter that a false description had been given to it . . . . the known intention of the parties overcomes the error in the words of the contract"; but it is matter of proof for the insured to show the insurer's knowledge.[271] A "steamship" has been defined as a three-masted, square-rigged vessel, capable of propulsion by steam or sails, and implies a warranty that she is properly equipped, manned, and provisioned with reference to its character.[272] A steam propeller which is wrecked and abandoned as a total loss, and which is taken in tow by a wrecking master and then sinks, is still a "vessel" at the time of sinking within the provisions of a statute limiting the liability of owners of vessels, and the underwriter to whom the abandonment is made is an "owner" under such act.[273] Goods are sometimes shipped under a stipulation for an addi-

[270] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 174, et seq. *p. 172, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 18, 19, 336; 1 Marshall on Insurance, ed. 1810, *p. 313.

[271] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 3, pp. 128, 129.

[272] Howard v. Orient Mut. Ins. Co., 2 Rob. (N. Y.) 539.

[273] Craig v. Continental Ins. Co., 141 U. S. 638; 12 Supr. Ct. Rep. 97; 21 Ins. L. J. 127.

tional premium if upon vessels below a certain rating. In this connection the word "rating" means the determination of the relative state or condition of vessels with reference to their insurable qualities, and unless the policy affords some rule of guidance in the matter, it must be left to the jury, depending for its determination upon all sources of information available, the same as any other question of value, quantity, or quality, and the rate of classification on the insurer's register is not conclusive, and even in case of a usage to consider the rating of vessels on the insurer's register conclusive, the rating must be of that particular vessel and of a recent date.[274] Where a vessel was designated as a "brig" of a certain name under a policy on cargo, and she was not a brig proper, but an hermaphrodite brig, and there was a vessel of the same name which was a brig, it was held that the descriptive term "brig" was so far a word of limitation that the insured must show that the half brig was the vessel intended.[275]

§ **1768. Ship's Name Important—Master's Name.**—The ship's name may be important to enable the underwriter to fix the identity of the ship, to apply certain information, and to determine whether he shall assume the risk at all or at an enhanced premium. It may, notwithstanding the extensive means of information now possessed and available to underwriters, involve a question of misrepresentation or concealment whereby the assurer is so materially misled in assuming the risk as to vitiate and annul the contract. It is also important to so far designate the property covered that the contract will be complete in the sense that the minds of the parties will meet as to the subject matter, and this rule applies equally where the insurance is upon goods or merchandises on board ship.[276] A mere misnomer, however, which does not

[274] Insurance Cos. v. Wright, 1 Wall. (U. S.) 456.

[275] Sea Ins. Co. v. Fowler, 21 Wend. (N. Y.) 600.

[276] 1 Marshall on Insurance, ed. 1810, 312 a; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 30, sec. 23, pp. 172. *170, sec. 76; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 239, et seq., 333, et seq.; Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 7, p. 47; c. vi, sec. 1, p. 123.

prevent recognizing the identity of the ship, there being no uncertainty as to the subject designated, will be immaterial so far as the validity of the contract is concerned, but otherwise if the misnomer is intended to mislead or prevents the identification of the ship,[277] and Emerigon is of the opinion that an error in the name of the ship is not material where the error does not prevent recognizing the ship's identity.[278] Under the English marine policy the master's name should be inserted, the rule relating thereto depending upon much the same reasons as those above stated in relation to the ship, and also for the reason that the underwriter may be governed in determining the acceptance of the risk by his knowledge of the degree of skill, prudence, capabilities, and reputation of the master. That the strictest accuracy is not required in this matter is evidenced by the additional clause in the policy "or whoever else shall go for master" used in the English form, thereby avoiding the question of error in the master's name.[279] In this country many policies designate no blank for the master's name, and frequently a designated blank therefor is left unfilled. If, however, the name of the master be absolutely necessary to designate the vessel insured, as in case of other vessels of the same name, it should be inserted. So its insertion may be required in cases where the underwriter depends upon the knowledge, degree of skill, prudence, capabilities, and reputation of a master.[280] But as a general rule, if the vessel is sufficiently known and designated without the master's name, it would seem that the omission thereof ought not to invalidate the contract, and cases arise where it is not known who is to be the master, which necessarily precludes such naming in the policy. In a New York case A was named

[277] Le Mesurier v. Vaughan, 6 East, 383; Ionides v. Pacific F. & M. Ins. Co., L. R. 6 Q. B. 674; Ruan v. Gardiner, 1 Wash. (C. C.) 145; Bates v. Hewitt, L. R. 2 Q. B. 595; Hall v. Molineux, cited in 6 East, 385; 1 Duer on Marine Insurance, ed. 1845, 172, sec. 20.

[278] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 1, p. 127. The English policy contains the clause, "by whatsoever other name or names the same ship . . . . is or shall be named or called."

[279] 1 Marshall on Insurance, Perkins' ed. 1850, p. 31, sec. 24; 1 Marshall on Insurance, Maclachlan's ed. 1887, 240.

[280] See Orr v. Home Mut. Ins. Co., 12 La. Ann. 255.

in the register as master, and signed shipping articles and gave a bond to the collector of customs. The whole charge of navigating the ship, however, devolved upon the first mate, as the nominal master was to act as purser. The mate was thoroughly skilled and competent for the undertaking, and it was held that this was no concern of the insurers; that it was sufficient compliance with the insurance contract that the vessel was under the command of a competent and skillful master, without regard to the fact whether his name appeared in the register or not.[281]

§ **1769. Change of Ship or Master or Name of Ship.**— After the risk has commenced only necessity or consent of the insurer will warrant the change of the ship. This rule, however, can only apply to cases of insurances on goods, etc., and has already been considered.[282] The form of the English policy covers a change of the master, and Emerigon notes that it was customary to insert in policies in that country the ordinary clause "or other for him," the effect of which would permit a change of masters, and he asserts that such a clause is not to be implied, and if omitted, and there be a change of masters, the insurers would be released, unless they had consented thereto or the change had been made through necessity; so the general rule is, that a change effected in good faith before the commencement of the voyage and without any fraudulent purpose, the master substituted being competent, does not avoid the policy, and if the voyage has commenced and the master dies, or through sickness or otherwise he becomes disabled or incompetent, or resigns, or another is appointed, or other necessity arises, the change will not vitiate the policy, and it is held in this country that the mate may by substitution become a de facto master in cases where the master is rendered incompetent, although the rule seems to be otherwise in England, except in cases of special necessity, but

[281] Draper v. Connecticut Ins. Co., 21 N. Y. 378; reversing 4 Duer (N. Y.), 234.

[282] See secs. 1594-1596, herein. See 1 Marshall on Insurance, ed. 1810, *167, et seq.; Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 15, p. 339, et seq.

a foreign master cannot be substituted.[283] In a Massachusetts case it is declared that a mate as well as the master is presumed to be competent and skilled in theoretic and practical navigation and general seamanship, and that he is the regular successor of the master, and his appointment as mate is in effect the prospective appointment of a master, to take effect in any of the exigencies which may require such appointment, and by substitution in case of the master's death or of his sickness, or such other cause as shall render him incapable of having command, he becomes de facto master, and therefore if the master is found incompetent at a foreign port to command the vessel, the mate may take command, and that if under his command the vessel is lost on her voyage home, the insurers are not discharged because of the substitution.[284] In Missouri, the policy stipulated that notice should be given the underwriters without delay in case of a change of masters or owners, and that in such case the assurers might return a pro rata premium and terminate the contract. A sale and change of masters was effected, of which notice was given and no objection made. Another master was substituted on account of sickness in the family of the second master and the assurers were not notified, and it was held that the assurer was discharged.[285]

§ 1770. Ship's Enrollment as Affecting Validity of Policy.—Where the ship was insured under a time pol-

[283] Emerigon on Insurance, Meredith's ed. 1850, c. vii, sec. 3, pp. 149, 150; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 182, *181, et seq.; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 343, et seq. This latter (pp. 344, 345) refers to Morocco Land & Trading Co., Limited, v. Fry, 11 L. T., N. S., 618; 11 Jur., N. S., 76, per Stuart, V. C.; Farmer v. Legg, 6 Term Rep. 186; to statute, 17 & 18 Vict., c. 104, sec. 136; 25 & 26 Vict., c. 63, sec. 5, requiring certificated masters, mates, étc., and other cases construing this statute. See, also, Richards on Insurance, ed. 1892, 225, 226; he cites no cases, however. See Clifford v. Hunter, 1 Moody & M. 103; 3 Car. & P. 16; Marigny v. Home Mut. Ins. Co., 13 La. Ann. 338; citing Bell v. Western M. & F. Ins. Co., 5 Rob. (La.) 446.

[284] Copeland v. New England M. Ins. Co., 2 Met. (Mass.) 432, per Shaw, C. J.

[285] Tennessee M. & F. Ins. Co. v. Scott, 14 Mo. 46; Eddy v. Tennessee M. & F. Ins. Co., 21 Mo. 587. See Walden v. Firemen's Ins. Co., 12 Johns. (N. Y.) 138; 3 Kent's Commentaries, 5th ed., 257.

icy by the name "Mary," and it appeared that she was remodeled and enlarged upon the keel, floor timbers, and naval timbers of the "Sophronia," and then named as insured, and so enrolled before her enrollment under her original name was surrendered to the customhouse, it was held that noncompliance with the laws of the United States in obtaining her register did not avoid the policy.[286]

§ 1771. Ship as Privateer or Letter of Marque.—Emerigon is of the opinion that a vessel fitted out as a privateer should be described as such, because of the increased peril.[287] In this country the principal cases concerning a privateer or letter of marque have been before the courts upon the question of deviation and what is meant by the relative terms. Mr. Arnould says: "It is quite certain that if it were verbally represented to the underwriter that such was her destination, this would be sufficient in this country, though she were not so described in the policy."[288] And such a rule might seem to be sanctioned in this country by as eminent an authority as Mr. Justice Story, who says that the description as a letter of marque does not enlarge the construction of the policy, provided it be known to the underwriter that the ship sails under such a commission, it being merely evidence on the point of concealment calculated to rebut any presumption thereof.[289] It would seem, however, from the facts of this case to which the language of Mr. Justice Story must be held to have reference, and also from other decisions, that the rule here is that the mere fact of taking a commission as a letter of marque

[286] Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157.

[287] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 3, p. 131.

[288] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 174; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 336. But see Moss v. Byran, 6 Term Rep. 379, per Lord Kenyon.

[289] Haven v. Holland, 2 Mason (C. C.), 232. "It appears to me that it is wholly immaterial whether the vessel be described in the policy as a letter of marque or not, provided the fact of her sailing under such a commission be known to the underwriters. The description of the fact does not make the construction of the policy more broad, but it repels any defense founded upon the concealment of a fact material to the risk," per Story, J.

does not of itself affect the validity of the policy, and it would also seem that the vessel ought to be insured as a privateer or letter of marque in all cases where the use of the commission would enhance the risk actually assumed, as where such use would constitute a deviation, but as the policy only evidences the contract, if the proof is otherwise clear from admissible evidence that the insurers knew the full nature and extent of the risk in the absence of a description in the policy, then they ought to be bound.[290] This question will, however, be further considered under the head of "deviation."

§ **1772. Ship or Ships.**—The necessities of commerce frequently give rise to an occasion for effecting insurances where the merchant is ignorant of the fact on board what ships his goods will be laden, or it may be important that the merchant should be able to avail himself of an opportunity to ship his goods on board the first vessel which may offer for that purpose, especially so in times of war; or a merchant may expect a consignment of goods from a foreign port and be desirous that they should be immediately covered by a policy, and yet in such cases it may be impossible to specify the name of the ship, or it may happen that to do so would injuriously affect the insured's interests. In cases of this character, by usage an authority so firmly established as to make the legality of such insurances indisputable, the policy may be effected upon goods on board any ship or ships or on board ship or ships.[291] If the policy be upon "ship or ships," and the insurer knows the ship's name and that that ship is advertised as in danger, which intelligence could be applied by the underwriter had he been informed of the ship's name, the failure

[290] Wiggin v. Boardman, 14 Mass. 1, per Parker, C. J. See Wiggin v. Amory, 13 Mass. 118; 14 Mass. 1, 10; Moss v. Byran, 6 Term Rep. 379, per Lord Kenyon; Hove v. Mason, 1 Wash. (Va.) 207. See Bates v. Havitts, L. R. Q. B. 595; and criticism in 1 Parsons on Marine Insurance, ed. 1868, 481.

[291] Emerigon on Insurance, Meredith's ed. 1850, c. vi, sec. 5, p. 139, et seq.; 1 Marshall on Insurance, ed. 1810, *172, et seq., 314; Kewley v. Ryan, 2 H. Black. 343; De Costa v. Firth, 4 Burr. 1966; 3 Kent's Commentaries, 5th ed., 257, et seq.; Orient Mut. Ins. Co. v. Wright, 23 How. (U. S.) 405, per Nelson, J.

to disclose, coupled with the other fact that the ship is advertised as in danger, would be a concealment fatal to a recovery.[292] In cases of insurances on goods on board "ship or ships" it is the duty of the assured to declare the name of the ship or ships so soon as he has knowledge thereof, but nevertheless it is not a condition precedent to the right of recovery that the ship's name be declared before loss, and cases frequently occur where the assured has no knowledge of the ship's name before the loss.[293] But although the policy is upon property on board "ship or ships," it may be so worded as to necessitate a declaration before loss,[294] or it may contain such stipulations that the insurers may not be liable in case the vessel is not declared before loss, even though the name of the vessel on which the goods are to be shipped or the loss be not known to either party at the time; as where the policy provided that in case of loss by certain perils "known to the applicant, the public, or the company at the time application was made, and evidence whether such property was known to be involved or not," the company should not be liable except it should be so provided in the policy, and the name of the vessel not being known was not declared, but the goods were on a vessel known by both parties to be lost by one of the perils enumerated, the insurers were held discharged.[295] But if the valuation is extended under a policy on goods in any ship to be declared, and at that time of extension the ship be actually lost, and such fact be known to both parties, nevertheless the insurers will be liable where it appears that it was not then known to either party that the ship lost was one upon which

[292] But see 1 Arnould on Marine Insurance, Perkins' ed. 1850, 175, *173. But the rule stated by Mr. Arnould is evidently not noted by Mr. Maclachlan: 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, omitted on p. 337, corresponding to p. 175 of Perkins' ed. And see 2 Duer on Insurance, ed. 1846, 404, 409, 511-14.

[293] Gledstanes v. Royal Exch. Assur. Co., 11 Jur., N. S., 103; 5 Best & S. 797; 34 L. J. Q. B. 30; Wells v. Pacific Ins. Co., 44 Cal. 397; Arkansas Ins. Co. v. Bostick, 27 Ark. 539; Harman v. Kingston, 3 Camp. 150; Crawford v. Hunter, 8 Term Rep. 16; Kennebec Co. v. Augusta Ins. etc. Co., 6 Gray (Mass.), 204, per Merrick, J.

[294] Edwards v. St. Louis Perpetual Ins. Co., 7 Mo. 382.

[295] Mark v. Ætna Ins. Co., 29 Md. 390.

any risk had been taken.[296] Where the policy is effected on all sums at risk above a certain amount on goods on board any ship of a specified class to be thereafter declared, the words "to be thereafter declared" do not give the right to reject the risk when declared, but will be construed to mean that the insured will declare the name of the ship to which they will apply the policy as soon as the excess over the specified sum is taken.[297] So in a policy on goods on board ship or ships to be thereafter declared the declaration does not require the underwriter's consent. It is a power conferred upon the assured which he has a right to exercise, and an error may be revoked and the insured correct his declaration,[298] for an error declaring the ship or ships will not be fatal.[299] A policy on cargo by steamers cannot be limited to those only in which the insured had an interest, notwithstanding such steamers were contemplated when the insurance was effected.[300]

§ 1773. Ship or Ships—Right to Apply Policy in Case of Different Shipments and Losses.—It was early decided that where an insurance is effected by different policies in different amounts on goods on board ship or ships, the assured has the right by declaration to apply the policies to specific goods on board a particular ship, and where he so applies the policy the underwriters on the policy so appropriated shall alone be liable in case of the loss of that ship. The general principle being also deduced that in case of policies on board ship or ships the assured may apply either policy to a loss of property on board any ship which comes within the terms thereof.[301] In a case in Massachusetts the court said: "We

[296] Gledstanes v. Royal Exch. Assur. Co., 11 Jur., N. S., 103; 5 Best & S. 797; 34 L. J. Q. B. 30.

[297] Gledstanes v. Royal Exch. Assur. Co., 11 Jur., N. S., 103; 5 Best & S. 797; 34 L. J. Q. B. 30.

[298] Robinson v. Tomay, 3 Camp. 158; 1 Maule & S. 217. See Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.), 214, per the court; Imperial M. Ins. Co. v. Fire Ins. Corp., Limited, 4 C. P. Div. 166.

[299] Robinson v. Tomay, 3 Camp. 158; 1 Maule & S. 217.

[300] New York M. & F. Ins. Co. v. Roberts, 4 Duer (N. Y.), 141.

[301] The two cases relied on by the leading text writers are Henchman v. Offley, and Kewley v. Ryan, 2 H. Black. 345, n., and 2 H.

think . . . . that the plaintiff . . . . had the right (under the limitations hereafter stated) to elect upon which of the

Black. 343, both reported in Marshall on Insurance, ed. 1810,*173,*175. In the case of Henchman v. Offley, there were two separate policies; one for six thousand pounds on goods on board any ship or ships which should sail from certain specified ports between designated dates, the other was for four thousand pounds on goods on board any ship or ships which should sail from specified ports between certain other dates. The insured loaded goods on board a certain vessel, and entered a certificate before a magistrate in India, appropriating each policy to specific goods on board each ship, naming them. The goods loaded on board ship A, to which the six thousand pounds policy was applied, were in the amount of four thousand eight hundred and eighty-nine pounds; on the other vessel, B, the amount loaded was in the sum of four thousand five hundred pounds. Both ships sailed within the stipulated time, ship B arriving in safety, ship A being lost. Evidence of the declaration made in India was sought to be rejected, but it was admitted by Lord Mansfield in evidence. It was also urged in defense that there should be a contribution, as for an average loss, in the ratio of four thousand eight hundred and eighty-nine pounds to four thousand five hundred pounds, and that in any event the defendants were only liable for the former sum, and a verdict being found for the six thousand pounds, and a new trial had, the recovery of this amount was adjudged less the sum of eleven hundred and eleven pounds for what had been saved, the ground of the decision being that the assured had a right to apply the policy for six thousand pounds to the ship lost. The respective names of the ships differ in the regular report and Mr. Marshall's report of this case: See note a, in Mr. Marshall's report. In Kewley v. Ryan a policy was effected for the amount of twelve hundred and sixty pounds on goods of the assured on board ship A. Another insurance for the sum of thirteen hundred pounds was effected under two policies, one for seven hundred pounds, another for six hundred pounds, on board ship or ships for the same party, on like goods intended to be shipped. Ship A arrived safely; the ship containing the second cargo was totally lost. An action was brought on the policy for seven hundred pounds, and a recovery was adjudged, the court holding that the assured might apply the insurance to whatever ship came within its terms. This decision was based upon that first noted. The rule deduced by Mr. Marshall from this case is this, that "If two distinct insurances be made on goods for the same person and the same voyage, the one on board a specific ship, the other on board any ship or ships, and the former arrive safe, but the latter is lost, the insured shall apply the policy on goods on board ship or ships to the goods lost": 1 Marshall on Insurance, ed. 1810, *173-75. See, also, 1 Arnould on Marine Insurance, Perkins' ed. 1850, 177, *175, sec. 78; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 340, 341; 1 Parsons on Marine Insurance, ed. 1868, 519; 1 Phillips on Insurance, 3d ed., 239-41, sec. 438.

shipments made they would apply the policy stipulated for," declaring, however, that the insured must notify the insurer of his election seasonably, and must act in entire good faith, and that the mere fact alone of loss intervening the election being seasonably made, and in good faith, does not prevent the insurance attaching. The case, however, was a policy "lost or not lost on board any steamer or steamers," risks to be indorsed.[302] Our authors agree, however, that if the insured has not appropriated, or by some act or otherwise evidenced an intent to appropriate, the policy to goods in a particular ship, it will apply to and cover all goods of the insured at risk which come clearly within the terms of the policy by reason principally of the peculiar facilities which are offered for fraud under this class of policies. But the contract nevertheless would seem to require the utmost good faith on the part of both assured and assurer, as is evidenced by the fact of the difficulty of proof to aid the assured in case he seeks a return of the premium.[303]

§ 1774. Stock of Goods, etc., in Manufacturing—Stock in Trade of Mechanic—Fire Risk.—An insurance upon a stock of goods used in a manufacturing business or industry, or upon the stock in trade of a mechanic, covers everything necessarily or usually or commonly employed in the manufacture of the particular class of goods to which the insurance relates, and has a more extended application than an insurance upon a stock in trade of a merchant.[304] Thus, a policy on an engine and machinery for the manufacture of tinware will cover dies used in giving form to the goods manufactured.[305] So articles used in packing cover coal in the yard reasonable

[302] Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.), 214.

[303] See citation of text-writers in note preceding last.

[304] Bryant v. Poughkeepsie Ins. Co., 7 N. Y. 200; 21 Barb. (N. Y.) 154; Seavey v. Central Mut. F. Ins. Co., 111 Mass. 540; Haley v. Dorchester etc. Ins. Co., 12 Gray (Mass.), 545; Phœnix Ins. Co. v. Favorite, 49 Ill. 259; Crosby v. Franklin Ins. Co., 5 Gray (Mass.), 564; Pindar v. Kings Co. Ins. Co., 36 N. Y. 648; Moadinger v. Mechanics' Ins. Co., 2 Hall (N. Y.), 490.

[305] Seavey v. Central Mut. F. Ins. Co., 111 Mass. 540.

for the amount of business done,[306] and extrinsic evidence may be admissible to show what presses are covered by a policy upon lithographic presses.[307] So the court may properly refuse to instruct the jury that stock in a tannery does not embrace bark properly used in the business, but exclusively refers to hides and leather,[308] and fixtures, tools, materials, implements of business, and everything necessary to carry on the business are included in a policy on the stock in trade of a mechanic.[309] A policy on the insured's stock as rope manufacturers in a certain building, although it does not prevent using the stock in the building for the purpose of rope manufacture, yet it will not cover the manufactured article.[310] The stock in trade of a baker covers everything necessary for the business, and includes bread-troughs, sieves, pans, stoves, baskets, benches, etc.[311] The words "stock of lumber and goods manufactured and in process of manufacturing in said building" cover all the property in the building, and not merely that in process of manufacture.[312] Unmanufactured or raw stock of the kind mentioned is covered by a policy on a blacksmith and carriage-maker's stock, manufactured and in process of manufacture.[313]

§ 1775. Stock in Trade—Goods or Merchandise for Sale—Fire Risks.—A policy on a stock in trade upon goods or merchandises generally covers all articles of merchandise such as are usually kept for sale in the business specified, unless the risk be limited by a specific description of what the stock consists of, or unless the policy by explicit terms excludes goods of a certain or designated class or goods of a named specific kind from its protection, or otherwise limits the insurance to certain articles, although in certain cases prohibited articles

[306] Phœnix Ins. Co. v. Favorite, 49 Ill. 259.
[307] Mangle v. Holyoke Mut. F. Ins. Co., 1 Holmes (C. C.), 287.
[308] Planters' etc. Ins. Co. v. Deford, 38 Md. 382.
[309] Moadinger v. Mechanics' F. Ins. Co., 2 Hall (N. Y.), 490.
[310] Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383.
[311] Moadinger v. Mechanics' etc. Ins. Co., 2 Hall (N. Y.), 490.
[312] Insurance Co. v. Throop, 22 Mich. 146.
[313] Spratley v. Hartford Ins. Co., 1 Dill. (C. C.) 392.

may be kept notwithstanding the inhibition in the policy. The policy may also include articles which will not ordinarily be insured except at special rates, and evidence may be admissible to show that certain articles come within the description in the policy, and in this connection the written description will control the printed part.[314] The words "stock in trade" may, however, be limited by other words and clauses.[315] Where the insured conducted the wholesale and retail drug business in stores in the same building separated only by a partition, and the policy was upon "their wholesale stock of drugs," etc., and "other goods on hand for sale," while "contained in the building," it was held that the whole clause should be construed together, and all the goods in the building, whether in the wholesale or retail department and otherwise within the description, were covered.[316] Reference must, however, be had to the character of the trade or business engaged in; thus, a policy upon a jeweler's stock in trade does not cover blankets, although used for the purpose of protecting the store from a near-by fire, and even though purchased with the insurer's consent.[317] Whale oil, friction matches, glassware, and the like may be shown by parol evidence to be included in the term "usual variety of a country store." [318] The words "stock of family groceries" will not warrant keeping hazardous articles.[319] A policy on a "stock of vinegar in store and in tank" does not cover a mix-

[314] Pindar v. Kings Co. Ins. Co., 36 N. Y. 364; 93 Am. Dec. 544; De Longuemere v. Tradesman's Ins. Co., 2 Hall (N. Y.), 589; Corrigan v. Lycoming F. Ins. Co., 53 Vt. 418; 38 Am. Rep. 687; Whitmarsh v. Conway F. Ins. Co., 16 Gray (Mass.), 359; 77 Am. Dec. 414; Rafel v. Nashville Ins. Co., 7 La. Ann. 244; James v. Lycoming F. Ins. Co., 4 Cliff. (C. C.) 272; Moore v. Protection Ins. Co., 29 Me. 97; Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485; Crombie v. Portsmouth F. Ins. Co., 26 N. H. 389; Crosby v. Franklin Ins. Co., 5 Gray (Mass.), 504; Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350; Hall v. Insurance Co., 58 N. Y. 292; 17 Am. Rep. 255.

[315] Rafel v. Nashville Ins. Co., 7 La. Ann. 244.

[316] Wilson Drug Co. v. Phœnix Assur. Co., 110 N. C. 350; 14 S. E. Rep. 790.

[317] Wells v. Boston Ins. Co., 6 Pick. (Mass.) 182.

[318] Whitmarsh v. Conway F. Ins. Co., 16 Gray (82 Mass.), 359; 77 Am. Dec. 414.

[319] People's Ins. Co. v. Kuhn, 1 Cent. L. J. 214.

ture in the process of manufacture, nor does an insurance on the implements of the plant include the same.[320]

§ 1776. Stock in Trade—Stock in Building—Owner and Goods of Others.—The policy may by its terms limit the meaning of the words "manufactured or being manufactured," as where it stipulates "not liable for loss on property owned by any other party" unless specified. In such case it will not cover goods of others left to be manufactured.[321] And where the application stated that the applicants proposed to insure "our property," and said application was made a part of the contract, it was held that the insurance only covered such stock in trade as belonged to the insured, and not goods consigned to them for sale on commission.[322] So a policy on all articles making up the stock of a pork-house, and all within and appurtenant to the building, covers everything belonging, necessary to, and commonly used therein as part of the business, without regard to the particular ownership of such articles.[323] A policy issued to a railroad corporation upon "any property upon which they may be liable in freight buildings or yards" of the corporation covers merchandise belonging to other parties for which the corporation are liable as common carriers, although other common carriers are by contract bound to indemnify the corporation for all loss upon such merchandise. But such a policy will not cover articles of a kind specified in the policy to be not insurable unless by special agreement.[324] But in cases of property held in trust or on commission, if the policy stipulates that it must be declared as such, the provision must be complied with, otherwise property so held will not be covered.[325]

[320] Purves v. Germania Ins. Co., 44 La. Ann. 123; 10 S. Rep. 495; 21 Ins. L. J. 306.

[321] Getchell v. Ætna Ins. Co., 14 Allen (Mass.), 325.

[322] Planters' Mut. Ins. Co. v. Eagle, 52 Md. 468, one judge dissenting.

[323] Ætna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242.

[324] Commonwealth v. Hide, 112 Mass. 136; 17 Am. Rep. 72. See Eastern R. R. Co. v. Relief F. Ins. Co., 98 Mass. 420.

[325] See sec. 2001, herein; Duncan v. Sun Mut. Ins. Co., 12 La. Ann. 486.

§ 1777. Stock in Trade, etc., may Cover Property Specifically Excluded or the Keeping of which is Prohibited. Although the policy stipulates that the keeping or storing enumerated articles or articles of a class usually denominated as hazardous, extrahazardous, and the like will avoid the contract, yet if the property described in the policy and the purposes to which the building is dedicated sufficiently indicate the nature and character of the articles kept or to be kept, or if the risk is upon a stock of goods, and the description indicates that it is a class of property which usually contemplates the keeping of a small quantity of a hazardous article, and the business to be transacted and the nature and extent of the risk must have been known to the insurers to embrace articles and pursuits prohibited by the schedule, the policy is not avoided by the keeping of such of those articles as would come within the above rule.[326] The above rule, however, does not apply to and cover those cases where instead of a general description covering such stock there is such a specific description as to clearly evidence the intent of the parties to exclude the keeping of goods other than those of the specified class, and even knowledge that the insured kept such goods may be presumed on the part of the insurers.[327] Where the written part of a fire policy includes "drugs" and "such other merchandise as is usually kept in a country store," and the printed part excepts benzine without written permission, it is a question of fact whether benzine is permitted.[328] In a policy insuring "manufactured barrels and materials for same," the word "materials" means such as are necessarily or usually or commonly employed in their manufacture, and benzine being prohibited by the policy is not included as an article insured or covered by the above language in the absence of proof; nor could an insurance company have presumptive knowledge that

[326] Archer v. Mechanics' etc. Ins. Co., 43 Mo. 434; New York v. Brooklyn etc. Ins. Co., 41 Barb. (N. Y.) 431; Citizens' Ins. Co. v. McLaughlin, 54 Pa. St. 485; Hall Insurance Co. v. De Graff, 12 Mich. 124; Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

[327] Pindar v. Continental Ins. Co., 47 N. Y. 114; 38 N. Y. 364; Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.

[328] Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418; 38 Am. Rep. 687.

benzine was an article necessarily or commonly used in the manufacture of barrels.[329] If the printed clauses prohibit such keeping and the written ones permit it, the written clauses will prevail.[330]

§ 1778. Whaling and Fishing Voyages — Outfits— Stores, Catchings, etc.—The word "outfits" has a more extensive meaning when used in connection with whaling voyages than when applied to ships in general, and will include in the former case, in addition to the ordinary tackle and apparel of the ship, those articles necessary for consumption and use in prosecuting a voyage for the term contemplated, or in accomplishing the object and purpose thereof, such as stores, provisions, clothing, casks, stoves, boilers, cisterns, and fishing gear, apparatus, and instruments for storing the produce or catchings, and the term is also held to cover by usage in fishing voyages a certain proportion of the catchings substituted for the outfits consumed or used.[331] Although under a custom for men on fishing voyages to furnish their own provisions, as in case of cod and mackerel fishing, such provisions will not be covered by the term "outfit." The word "catchings" is the technical word, which in whaling voyages includes the blubber taken on board, the oil, and casks, and inasmuch as "outfits" generally refers to the outward lading, it is said to be a reasonable inference that the word "cargo" is limited to the produce and "catchings" on board the ship for the homeward voyage, and it is also declared that there is no reason why on principle "cargo" should not cover "outfits."[332] The words "cargo" or "goods and merchandise" will, however, cover oil, catchings, and other products of the adventure.[333] Under a

[329] McFarland v. Peabody Ins. Co., 6 W. Va. 425.

[330] Stout v. Commercial Ins. Co., 11 Biss. (C. C.) 309; 11 Ins. L. J. 688. But see Steinbach v. Insurance Co., 13 Wall. (U. S.) 183.

[331] Macy v. Whaling Ins. Co., 9 Met. (Mass.) 366, per Hubbard, J.; Hancox v. Fishing Ins. Co., 3 Sum. (C. C.) 132; Hill v. Patten, 8 East, 373, per Lord Ellenborough.

[332] Macy v. Whaling Ins. Co., 9 Met. (Mass.) 366, per Hubbard, J. See, also, Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227, per Shaw, C. J.

[333] Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Hill v. Patten, 8 East, 374.

policy on "his five-eighths catchings" of a whaler, if the owner's interest is specified "as about two-thirds" and the "crew's share, about one-third" is expressly excluded, this is held to mean the owner's share reserved according to the ratio of the lays agreed on in the shipping articles, and that the crew's accounts with the vessel at the time of the loss should not be considered.[334] An insurance on "outfit and upon catchings" substituted for the outfits in a whaling voyage protects the "blubber" or pieces of whale flesh cut from the whale and on deck.[335] We have seen in a prior section that the outfits in an adventure of this character are not covered by the word "ship." "Oil, bone, and other takings" covers by usage sea-elephant oil.[336]

[334] Swift v. Mercantile Ins. Co., 113 Mass. 287.
[335] Roger v. Mechanics' Ins. Co., 1 Story (C. C.), 603.
[336] Child v. Sun Mut. Ins. Co., 3 Sand. (N. Y.) 26.

CHAPTER XLII.

CONCEALMENT—MARINE RISKS.

§ 1786. Concealment in marine insurances—Generally.
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§ 1834. Ship's true port of loading.
§ 1835. Other matters not necessary to be disclosed.
§ 1836. Other matters necessary to be disclosed.
§ 1837. Where inquiries are made.

§ 1786. Concealment in Marine Insurances—Generally. Concealment in marine insurances is the failure to disclose any material fact or circumstance which is in fact or law within, or which ought to be within, the knowledge of one party, and of which the other party has not actual or presumptive knowledge. This rule applies to both assured and underwriter, and rests upon the doctrine of good faith as well as the prevention of fraud. There are certain general principles governing this matter which may be stated substantially as follows: The underwriter is presumed to act upon the belief that the assured

is not at the time of effecting the insurance in possession of any material facts which he has not disclosed, and that no loss has occurred which by reasonable diligence might have been communicated. It is obligatory upon the assured, if he desires to avoid the charge of material concealment, to place the underwriter as far as possible in the same situation as he himself stands, so that the latter may have the same means and opportunity of judging the character and value of the risk. The chances of the assured and underwriter should be equal in this respect. The common ground on which both the assured and underwriter ought to stand is that of good faith and fairness. The assured is bound to communicate what it is in his power to communicate by ordinary means, and which might be communicated by the exercise of due and reasonable diligence. The assured is also obligated to communicate what is known in mercantile language as intelligence, material in itself or rendered so by other facts and circumstances. Common prudence would dictate to a reasonable business man that he should keep himself informed of all facts and circumstances whatsoever that might have a bearing upon the nature and perils of the risk were he himself to assume it, and that he should unreservedly communicate the same to the underwriter when he asks him to assume the risk. The information imparted should be as full and specific, so far as material, as that possessed by the assured. The facts as stated should not evade the whole truth by bearing merely the semblance thereof. The truth must be stated. It is not enough that the truth might be inferred from what is disclosed, and which is evidently intended to convey a wrong impression. Vague and general statements should not be made when specific, full, and exact information is in the possession of the assured and could be given. No presumption exists that the assured or his agents have concealed material facts. The concealment and materiality must be proven. There are many circumstances which are not material; they could not reasonably be held to affect the judgment of the underwriter in determining whether he will assume the risk, or, if he assumes it, what premium he will charge. Concealment of such facts will not be fatal. Again,

the means of information and judging may be equally open to both parties, and concerning such matters each professes to act from his own skill and sagacity, and there is no need in such cases, for either to communicate to the other party. Silence in such matters does not affect the validity of the contract; nor is it incumbent upon the assured to state what the underwriter actually knows, no matter how the knowledge was obtained, nor need matters be mentioned which the underwriter ought to know, or is presumed to know, nor of what he waives information concerning, nor what he takes upon himself the knowledge of. The main point in all cases is, Was there at the time the contract was effected a fair and truthful representation of material facts, or a fraudulent suppression of the truth in matters which are material; or there being no fraud or design, was there a failure, through neglect, accidental, or otherwise, to disclose facts which vary materially the object of the insurance and change the risk understood to be run, or increase the hazard? The preceding statements will be found sustained by the cases and opinions of the courts herein cited below, and also in those noted throughout this chapter.[1]

[1] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, per Lord Mansfield, noted at length under sec. 1845, herein, in note; Ionides v. Pender, L. R. 9 Q. B. 531; Haywood v. Rodgers, 4 East, 590, per Lord Ellenborough; Biays v. Union Ins. Co., 1 Wash. (C. C.) 506; North British Ins. Co. v. Lloyd, 10 Exch. 523; Frieve v. Woodhouse, Holt. N. P. 572; Bates v. Hewitt, 4 Fost. & F. 1023; 36 L. J. Q. B. 282; Neptune Ins. Co. v. Robinson, 11 Gill. & J. (Md.) 256; Pim v. Lewis, 2 Fost. & F. 778; Seaman v. Fonnereau, 2 Strange, 1183; Blackburn v. Vigors, L. R. 12 App. Cas. 531; Russell v. Union Ins. Co., 4 Dall. (U. S.) 424; Proudfoot v. Montifiore, L. R. 2 Q. B. 511; Murgatroyd v. Crawford, 3 Dall. (U. S.) 491; Shoolbred v. Nutt, reported in 1 Park on Insurance, 8th ed., 492; 1 Marshall on Insurance, ed. 1810, *475; Ely v. Hallett, 2 Caines (N. Y.), 57; Oliver v. Greene, 3 Mass. 133; De Longuemere v. New York F. Ins. Co., 10 Johns. (N. Y.) 120; Salvador v. Hopkins, 3 Burr. 1707; Norris v. Insurance Co. of North America, 3 Yeates (Pa.) 84; Blackburn v. Haslain, L. R. 21 Q. B. D. 144; Ratcliffe v. Schoolbred, reported in 1 Marshall on Insurance, ed. 1810, *468; Shirley v. Wilkinson, Doug. 306; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 185; Howe Machine Co. v. Farrington, 82 N. Y. 126. "Dolus malus non tantum in eo est, qui fallendi causa obscuri loquitur; sed etiam qui insidiose obscuri dissimulat"; and again: "Honorable merchants . . . . never abuse the ignorance of the assured, and when effecting insurance for themselves they omit no circumstance of the

§ 1787. Concealment Arising from Negligence, Accident, Mistake, etc., Avoids.—A concealment of any material fact, circumstance, intelligence, or information which ought to have been disclosed, and of which the insured has or ought to have, or is presumed to have knowledge, will be equally fatal whether such concealment arises from fraud, design, negligence, mistake, accident, or inadvertence.[2]

§ 1788. Concealment—Voluntary Ignorance will not Excuse.—If the assured fails to disclose material facts to the underwriter, his voluntary ignorance, whether it arises from fraud, design, or negligence, will not excuse him.[3]

§ 1789. A Specific and Full Disclosure is Required, not an Evasive One or One in General Terms.—The assured is obligated by good faith and the requirements of the contract of insurance to make a specific and full disclosure of all ma-

risks to which the insurers are about to expose themselves": Emerigon on Insurance, Meredith's ed. 1850, c. i, sec. 5, p. 17, et seq.; c. xv, sec. 3, p. 634, et seq. "A neglect to communicate that which a party knows and ought to communicate is called a concealment": Cal. Civ. Code, sec. 2561. "Each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, as to which he makes no warranty": Deering's Annot. Civ. Code Cal., secs. 2563, 2580, n. 2669.

[2] Union Ins. Co. v. Stoney, Harp. (S. C.) 235; Bebee v. Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, per Lord Mansfield, noted under sec. 1845, herein, in note; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, per Story, J.; Kohne v. Insurance Co. of North America, 1 Wash. (C. C.) 161, per Washington, J.; Stetson v. Massachusetts Mut. F. Ins. Co., 4 Mass. 330, per Sewall, J.; New York Bowery F. Co. v. New York F. Ins. Co., 17 Wend. (N. Y.) 359; Shirley v. Wilkinson, 3 Doug. 41, 306, n.; Vale v. Phœnix Ins. Co., 1 Wash. (C. C.) 283; Biays v. Union Ins. Co., 1 Wash. (C. C.) 506; Thompson v. Buchanan, 4 Bos. & P. 482; Hodgson v. Richardson, 1 Wm. Black. 463; McDowall v. Frazer, 1 Doug. 247; Moses v. Delaware Ins. Co., 1 Wash. (C. C.) 387; Burritt v. Saratoga Mut. F. Ins. Co., 5 Hill (N. Y.), 183; 40 Am. Dec. 345, per Bronson, J. "The nondisclosure of a material fact from ignorance, negligence, or inadvertence is as fatal to the contract as where it is the result of design": McArthur on Marine Insurance, ed. 1890, 8: Stetson v. Masachusetts Mut. F. Ins. Co., 4 Mass. 330; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; 20 Am. Dec. 547.

[3] Biays v. Union Ins. Co., 1 Wash. (C. C.) 506.

terial facts of which he has or ought to have knowledge, and an evasive statement which is in reality only a part disclosure, or one made in general terms, or one calculated to give rise to an inference that the risk is less hazardous than it is in reality, is concealment; for the underwriters should be placed so far as possible, as to knowledge of material facts, upon the same grounds as the assured.[4]

§ 1790. Concealment is Referred to the Time of Making the Contract.—A concealment has reference not to the event itself, but to the materiality of the fact at the time of making the contract or assuming the risk,[5] and cannot depend upon subsequent events or facts learned subsequently to assuming the risk; and in England, for this purpose, the time of making the contract will be held to be that when the slip is initialed, notwithstanding the stamp act.[6] "The duty of the assured or of his agent in making such communications of material facts must attach at the time of making the insurance, and cannot depend upon the subsequent event."[7] "These things are to be considered in the situation they were at the

[4] Moses v. Delaware Ins. Co., 1 Wash. (C. C.) 385; Ely v. Hallett, 2 Caines (N. Y.), 57, per Thompson, J.; Shirley v. Wilkinson, 1 Doug. 306, n., per the court; Storey v. Union Ins. Co., 3 McCord (S. C.), 387; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; 3 Kent's Commentaries, 283. "A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance": Cal. Civ. Code, sec. 2562.

[5] Stribley v. Imperial M. Ins. Co., 1 Q. B. D. 507, per the court; Ely v. Hallett, 2 Caines (N. Y.), 57, per Thompson, J.; Lynch v. Hamilton, 3 Taunt., per Lord Mansfield; Maryland Ins. Co. v. Reuden, 6 Cranch (U. S.) 338; Commercial Mut. M. Ins. Co. v. Union Mut. M. Ins. Co., 19 How. (U. S.) 318; Lynch v. Durnsford, 14 East (N. Y.), 497, per Lord Ellenborough; Livingston v. Maryland Ins. Co., 6 Cranch (U. S.), 279; Emerigon on Insurance, Meredith's ed. 1850, c. i, sec. 5, p. 18. See McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, per Story, J.; Marshall v. Union Ins. Co., 2 Wash. (C. C.) 357, per Washington, J.

[6] Cory v. Patton, 7 L. R. Q. B. 304; 41 L. J. Q. B. 195, n. Affirmed, 9 L. R. Q. B. 577; 43 L. J. Q. B. 181; Lishman v. Northern Maritime Ins. Co., L. R. 8 Com. P. 216; 10 Com. P. 179; affirmed 10 L. R. Com. P. 179; Ionides v. Pacific F. & M. Ins. Co., L. R. 6 Q. B. 674; 7 Q. B. 517, cited in 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 549.

[7] Lynch v. Durnsford, 14 East, 494, per Lord Ellenborough.

time of the contract, and not to be judged of by subsequent events." [8]

§ 1791. What Constitutes a "Material Fact"—Must It be a Fact Material to the Risk.—The concealment of immaterial circumstances by the assured will not vitiate the policy.[9] But the question arises, What constitutes a material fact or circumstance? Mr. Duer has exhaustively considered the point whether the fact concealed must be one material to the risk alone or one which would influence the mind of the underwriter in determining whether he will accept the risk, at what premium, and so embrace facts extrinsic to the risks, and he says the authorities are conflicting.[10] Some of the judges have unequivocally stated the rule to be this, that every fact and intelligence must be communicated that may affect the mind of the underwriter upon the point whether he will insure at all and as to the point what premium he will charge.[11] So it is held that this rule governs, even though the fact concealed may not be material to the risk.[12] Other judges have stated that the facts concealed must be material to the risk,[13] and in other opinions the terms "material facts" and "material to the risk" are used interchangeably.[14]

§ 1792. Same Subject—Opinions of the Text-writers. Emerigon says: "One is guilty of fraud . . . . when to procure himself insurers or to induce them to rest content with a less premium . . . . he conceals important circumstances which it concerns them to know before underwriting the policy. . . . . So far as the nature of the contract will allow, the chance of the insurers and of the assured must be the same.

A person about to effect insurance must reveal all the

[8] Seaman v. Fonnereau, 2 Strange, 1183, per Lea, C. J.

[9] Price v. Vanuxem, 3 Yeates (Pa.), 30.

[10] 2 Duer on Marine Insurance, ed. 1846, 388, et seq., 518, et seq.

[11] See opinions in sec. 1792, herein.

[12] Rivaz v. Gerussi, 6 L. R. Q. B. D. 222; 50 L. J. Q. B. D. 176.

[13] Livingston v. Maryland Ins. Co., 6 Cranch (U. S.), 274; Maryland Ins. Co. v. Ruden, 6 Cranch (U. S.), 338.

[14] See opinions in sec. 1792, herein.

facts which it imports the assurers to know."[15] Mr. Marshall says: "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer in determining whether he will underwrite the policy at all or at what premium he will underwrite it is material."[16] Mr. Arnould says: "By a 'material fact' is meant one which if communicated to the underwriter would induce him either to refuse the insurance altogether, or not to effect it except at a higher premium"; and again: "It is the duty of the assured to communicate to the underwriter all the intelligence that he has that may affect the mind of the underwriter in either of these two ways: 1. As to the point whether he will insure at all; 2. As to the point at what premium he will insure."[17]

§ **1793. Same Subject—Conclusion.**—The underwriter takes upon himself certain perils, and his liability to loss is based thereon under the contract made. Every prudent underwriter weighs carefully the probable extent of that liability in the light of all the facts and circumstances, intelligence, and information imparted to him or within his own knowledge which would increase or tend to increase the same, and such facts, circumstances, intelligence, and information must be and are material so far as they measure or aid in determining the insurers' liability were they to assume the risk, and are in this sense material to the risk. The test seems to be this, Is the fact such that it might, in the mind of any prudent underwriter governing himself by the principles on which underwriters in practice act, increase the liability to loss and thus influence him in determining whether he will accept the risk at all or at what premium? It is difficult to conceive how a prudent and reasonable underwriter acting within these conditions, and

[15] Emerigon on Insurance, Meredith's ed. 1850, c. i, sec. 5, p. 17, et seq.

[16] 1 Marshall on Insurance, ed. 1810, *467.

[17] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 540, 542, *536, *538; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 548, 560. See, also, 1 Phillips on Insurance, 3d ed., 312-16, secs. 572-75; 1 Parsons on Marine Insurance, ed. 1868, 467; 2 Duer on Insurance, ed. 1846, 383, 388, et seq., 681, note, 468, sec. 52.

having in view the obligations of the contract which he is about to make, can have his judgment upon the point of his liability to loss influenced by a fact which does not affect that liability and is wholly extrinsic thereto. If it is a fact which would influence his judgment under the conditions above stated, it is in reality material to the risk, even though it might possibly be not strictly material to the technical peril assured. Such a rule would impose no hardship, for its application does not rest upon the arbitrary and perhaps unreasonable judgment of a single underwriter, but upon certain principles governing prudent and reasonable underwriters in practice. It would seem, therefore, that a concealment is material, with reference to the validity of the risk or right to recover, when the fact concealed would if known have shown the risks or the liability of the underwriter to loss to be greater than appears upon the representation made, and would in consequence have induced a rational underwriter, acting upon principles which are presumed to govern prudent underwriters in practice, to have refused the risk or to have demanded a higher premium.[18] Facts must be regarded as material to the risk in insurance when knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all or in estimating the degree and character of the risk, or in fixing

[18] Murgatroyd v. Crawford, 3 Dall. (U. S.) 491; Rivaz v. Gerussi, 6 L. R. Q. B. D. 222; 50 L. J. Q. B. D. 176; Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593; per Lord Mansfield; Hernochen v. New York Bowery Ins. Co., 5 Duer (N. Y.), 1; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; Haley v. Dorchester etc. Ins. Co., 12 Gray (Mass.), 545; Haywood v. Rodgers, 4 East, 590, per Lord Ellenborough. "Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract or in making his inquiries": Deering's Annot. Civ. Code Cal., sec. 2565; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Livingston v. Maryland Ins. Co., 6 Cranch (U. S.), 274; Rosenheim v. American Ins. Co., 33 Mo. 239; Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507; Quinn v. National Assur. Co., 1 Jones & C. 316; Ionides v. Pender, L. R. 9 Q. B. 531; Hardman v. Firemen's Ins. Co., 20 Fed. Rep. 594; Hoyt v. Gilman, 8 Mass. 336; Maryland Ins. Co., 6 Cranch (U. S.), 338; Boggs v. American Ins. Co., 30 Mo. 63.

the rate of the premium.[19] There are, however, certain facts which are not necessary to be disclosed, as will appear from subsequent sections under this chapter.

§ 1794. Whatever Affects the State and Condition of the Ship at the Time is Material.—Whatsoever the insured knows concerning the state and condition of the ship at the time must be disclosed.[20] If the broker at the time the insurance is effected, in representing to the underwriter the state of the ship and the last intelligence concerning her, does not disclose the whole, and what is concealed appears material to the jury, it is fatal, even though the concealment be innocent and be deemed immaterial by the broker.[21] Where an insurance is upon a steamboat insured against fire, which is tied up for repairs and is so seriously damaged as to be unable to run, such facts materially affect the risk, and if concealed are fatal to a recovery.[22] So the fact that the ship has been driven upon a rock at an outport is material although she gets off without apparent damage, the ship being insured for her homeward voyage "at and from" and the loss resulting from the accident.[23] It is not, however, required that the insured should collect from all his documents all the materials for the history of his ship from the time of her being constructed to time of effecting the insurance;[24] nor unless there be an inquiry need the age of the vessel, nor where she was built,[25] nor whether the ship be home or foreign built be disclosed.[26]

[19] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192. Any fact is material, the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance: Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721.

[20] Fillis v. Brutton, reported in 1 Marshall on Insurance, ed. 1810, *467, per Lord Mansfield.

[21] Shirley v. Williamson, 1 Doug. 306, n. (2 B. M. 22 Geo. III). See Ely v. Hallett, 2 Caines (N. Y.), 57.

[22] Hamblett v. City Ins. Co., 36 Fed. Rep. 118.

[23] Gladstone v. King, 1 Maule & S. 35.

[24] Haywood v. Rodgers, 4 East, 590, per Lord Ellenborough.

[25] Popleston v. Ketchen, 3 Wash. (C. C.) 138.

[26] Long v. Bolton, 2 Bos. & P. 209.

§ 1795. Facts and Information Affecting the Condition or Safety of the Ship on Her Voyage—Subsequently Occuring Events.—If the assured at the time of effecting the insurance receives or has intelligence or information or knowledge of facts which affect the condition and safety of the ship on her voyage, and which in the mind of a prudent and rational underwriter would increase the hazard or liability to loss, it ought to be disclosed. Thus, where a letter was received containing particulars of a hurricane occurring after the ship had sailed, it was held fatal to recovery not to disclose the same, even though the underwriter knew generally that there had been severe gales off that coast; the ground of the decision being that the assured's knowledge was particular, that of the underwriter general.[27] So information that there were French privateers in certain seas was held material.[28] In another case the agent withheld information that vessels bound to the same port as that of the assured were ordered confiscated, and a recovery was denied.[29] Information received from the master that the vessel had been aground and had received heavy blows is material.[30] Whether the rule as to concealment of subsequently occurring weather would affect a retrospective policy is doubtful, except in cases of the character above stated where the information is privately received, is of a particular character, and is so near the time of the ship's sailing that it is highly probable that she would be exposed thereto. But if the fact is publicly known and is of an equally particular character as that of the assured's, so that the underwriter would be presumed to have had a special knowledge thereof, or in case of sailing from a home port, the reason for a disclosure ought not reasonably to be held to exist.[31]

[27] Moses v. Delaware Ins. Co., 1 Wash. (C. C.) 385; Ely v. Hallett, 2 Caines (N. Y.), 57.

[28] Beckthwaite v. Nalgrove, Holt, N. P., 388; 3 Taunt. 41, n.

[29] Hoyt v. Gilman, 8 Mass. 336.

[30] Russell v. Thornton, 4 Hurl. & N. 788; 6 Id. 140; 30 L. J. Ex. 69; Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 197.

[31] See 1 Arnould on Marine Insurance, Perkins' ed. 1850, 560, *556; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 576; 2 Duer on Marine Insurance, ed. 1846, 401, et seq.

§ 1796. Suspicions—Rumors — Reports—Apprehensions—Opinions—General Intelligence.—As a general rule the insured is not obligated to anticipate every possible ground of suspicion. He need not communicate loose rumors, mere idle talk, or reports gathered together no one knows how, nor need he disclose to the underwriter his fears, sensations, or apprehensions, his opinions, or expectations, his speculations or conclusions from the facts.[32] "We do not know that the insured is bound to anticipate every possible ground of suspicion which might weigh with some minds and totally escape the observation of others, ... but it is not every conjecture or opinion as to the materiality of the circumstances concealed which ought to weigh with the jury." [33] The assured is "not bound to communicate . . . . his fears or his hopes, but only to communicate any facts which justified them." [34] If it is alleged as a defense that the insured concealed from the insurer, at the time of making the contract, material facts within the knowledge of the former and not of the latter, such concealment must be made out affirmatively by the insurer.[35] But such a rule does not do away with the obligation to disclose doubtful rumors which are not too remote in their application, nor with the necessity of communicating a fact which operates to cause a reasonable belief, expectation, or fear that a material fact exists which would increase the risk were it known. And if the fact be material, whether it be an article of intelligence as that term is understood by mercantile men, or a rumor or report, it ought to be communicated. If imma-

[32] Durrell v. Bederly, Holt, N. P. 285, per Gibbs, C. J.; Folsom v. Mercantile etc. Ins. Co., 8 Blatch. (U. S.) 170; Brine v. Featherstone, 4 Taunt. 869, per Gibbs, C. J.; Marshall v. Union Ins. Co., 2 Wash. (C. C.) 357; Bell v. Bell, 2 Camp. 475, per Lord Ellenborough; McBride v. Republic F. Ins. Co., 30 Wis. 562; Bowden v. Vaughan, 10 East, 415, per Lord Ellenborough. "Neither party to a contract of insurance is bound to communicate even on inquiry, information of his own judgment upon the matters in question": Deering's Annot. Civ. Code Cal., sec. 2570.

[33] Marshall v. Union Ins. Co., 2 Wash. (C. C.) 527, per Washington, J.

[34] Ruggles v. General Mut. Ins. Co., 4 Mason (C. C.), 74, per Story, J.

[35] Folsom v. Mercantile etc. Ins. Co., 8 Blatch. (C. C.) 170.

terial, no disclosure is necessary, and the materiality is to be judged by the test whether the fact of the rumor, report, or intelligence would if communicated have, in the minds of reasonable and prudent men, made an impression affecting the liability to loss, and a rumor or report originating no one knows where may have become so prevalent and of so much importance as to be material in the sense that a failure to disclose the fact may be fatal.[36] Thus, if there is a fair and reasonable apprehension that property is exposed to danger, and the danger is really and substantially one which would enhance the risk in the mind of a man of ordinary prudence and caution, and is not mere idle talk or reports, the fact should be disclosed.[37] Again, this may be more clearly illustrated by the case where the moving cause of procuring the insurance is the apprehension that the property will be destroyed, brought about by rumors of an attempt to destroy it. Such fact is material, and should be communicated.[38] In cases of this character the apprehension relates to a fact which from its very nature might influence any prudent and reasonable underwriter in assuming the risk. In giving the above rules we have endeavored as far as possible to embody leading principles governing this class of cases, but it is not intended to state any positive rule, for we believe this to be impossible, in view of this, that what may constitute a material fact in one case may be actually immaterial in connection with other facts in another case. A fact differs from an apprehension, belief, or expectation. A rumor may have become so prevalent as to be material; it may be material only because of its connection with other facts, or it may be of no importance whatever. We believe that the assured would find it a safe and practical rule to always disclose

[36] Durrell v. Bederly, 1 Holt, 104, per Gibbs, C. J.; Lynch v. Hamilton, 3 Taunt. 37; Seamen v. Fonnereau, 2 Strange, 483; Graham v. Insurance Co., 6 La. Ann. 432; Lynch v. Durnsford, 14 East, 494; Nicholson v. Power, 20 L. T., N. S., 580; Johnson v. Phœnix Ins. Co., 1 Wash. (C. C.) 378; Bowker v. Smith, Fac. Coll. (Scot.) 571; Hoyt v. Gilman, 8 Mass. 336.

[37] McBride v. Republic F. Ins. Co., 30 Wis. 562, per the court.

[38] Walden v. Louisiana Ins. Co., 12 La. (O. S.) 134; Bufe v. Turner, 6 Taunt. 338; 2 Marsh. 46.

what he knows and what he has heard, even though its tendency to increase the risk may be doubtful in his mind. The assured "ought to have disclosed to them (the underwriters) what intelligence he had of the ship's being in danger and which might induce him at least to fear that the ship was lost, though he had no certain account of it." [39]

§ **1797. Same Subject—Cases.**—A vessel laden like that of the assured was reported ashore, and it was held fatal to conceal the fact.[40] Where it is rumored that the vessel is lost and the insured believes that she is out of time, and though he entertains doubts, yet has reasonable ground to believe her wrecked, this must be disclosed.[41] An insurance was upon a ship with letters of marque as a privateer. The ship was captured the day next after sailing by French frigates. Reports were prevalent that French frigates were about that coast, and a capture was reported to have been made. A binnacle had actually been seen floating with a compass upon it, and no disclosure was made to the underwriters. The jury, under a charge of Chief Justice Gibbs, found for the defendants.[42] Where an insured heard a doubtful rumor that a ship like his was captured, it was held that he ought to have disclosed intelligence which might induce him to fear that the ship was lost, though he had no certain account thereof.[43] Intelligence that the ship had been seen and was reported leaky, was lost sight of, and that the next day there was a hard gale, is material and must be disclosed.[44]

§ **1798. Facts Implied from, or Underwriter Put on Inquiry by Information Given—Waiver.**—The right to information of material facts may be waived by neglect of the

[39] De Costa v. Scandrett, 2 P. Wms. 170, per Macclesfield, Ch.
[40] Nicholson v. Power, 20 L. T., N. S., 580.
[41] Graham v. General Ins. Co., 6 La. Ann. 432.
[42] Durell v. Bederly, 1 Holt, 104.
[43] De Costa v. Scandrett, 2 P. Wms. 170; 2 Eq. Cas. Abr. 636.
[44] Seamen v. Fonnereau, 2 Strange, 1183; Lynch v. Durnsford, 14 East, 494; Lynch v. Hamilton, 3 Taunt. 37. See, also, Westbury v. Aberdeen, 2 Mees. & W. 267; Sawtelle v. London, 5 Taunt. 359.

underwriter to make inquiries as to facts distinctly implied by the information communicated, or where the facts disclosed are such as are calculated to put any reasonable and prudent underwriter on inquiry. Thus, a second letter referring to a former one was shown the insurers, but they did not call for the former one. The letter referred to contained information showing the loss of the master and that the crew was short-handed, and was not disclosed other than as above stated, and it was held immaterial.[45] Where the owners received a letter stating the apprehensions at Riga, arising from detention which would be necessitated by compliance with an order that the papers of all vessels arriving there should be forwarded to St. Petersburg, and only disclosed the fact that the ship's papers were sent to St. Petersburg for examination, it was held that failure to communicate the other contents of the letter was not fatal.[46]

§ **1799. Information, Belief, or Expectation of Third Person.**—The California code provides that "in marine insurance information of the belief or expectation of a third person, in reference to material fact, is material." [47] This rule would qualify the preceding cases and rule upon which they are based.

§ **1800. Failure to Communicate a Fact which would Show Known Information is Material.**—If the assured is in possession of certain facts which if known by the underwriter would enable him to apply that fact to known information, intelligence, or rumors, and the disclosure of that fact would show the information, intelligence, or rumor material, the fact becomes material and must be disclosed.[48]

[45] Freeland v. Glover, 7 East, 457; 6 Esp. 14.

[46] Bell v. Bell, 2 Camp. 479.

[47] Cal. Civ. Code, sec. 2676.

[48] Lynch v. Durnsford, 14 East, 494, per Lord Ellenborough and Bayley, J.; Bates v. Hewitt, L. R. 2 Q. B. 595; Lynch v. Hamilton, 3 Taunt. 37, per Lord Mansfield; Nicholson v. Power, 20 L. T., N. S., 580.

§ 1801. Where Intelligence or Report Proves Untrue. The fact that the intelligence or report proves untrue or unfounded does not aid the assured if it is a fact which is material and ought to have been disclosed.[49]

§ 1802. Intelligence, Reports, or Rumors of Loss.— What has been already said upon the point of rumors, intelligence, etc., under the preceding sections is applicable here, but in cases of loss the factor of fraud would perhaps enter more frequently into the cases. Thus, procuring a policy without disclosing secret information of a loss is fraudulent and avoids the insurance, even though only withheld from the agent who obtains the insurance, provided the intelligence could have been conveyed by the exercise of due and reasonable diligence.[50] And generally the failure of the applicant to state to the insurer material information possessed by him of material facts concerning the probable loss of a vessel which is overdue, is such a concealment as entitles the insurer to rescind the contract.[51] If the insured has directed insurance by letter, and he learns of a loss, and being in the neighborhood, he is bound to communicate the intelligence thereof by mail when he can do so in time.[52] But where the master took measures to prevent the loss being known, and the owner, not knowing of the loss, effected the policy in good faith, it was held that the master's act, even though fraudulent and done for the purpose of enabling the owner to secure himself, would not prevent a re-

[49] Hoyt v. Gilman, 8 Mass. 336; Seamen v. Fonnereau, 2 Strange, 1183; Lynch v. Durnsford, 14 East, 494, per Lord Ellenborough; Lynch v. Hamilton, 3 Taunt. 37. See, also, Westbury v. Aberdeen, 2 Mees. & W. 267.

[50] McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170; Johnson v. Phœnix Ins. Co., 1 Wash. (C. C.) 378. "A person insured by a contract of marine insurance is presumed to have had knowledge at the time of insuring of a prior loss, if the information might possibly have reached him in the usual mode of transmission, and at the usual rate of communication": Deering's Annot. Civ. Code Cal., sec. 2671; but see Id., sec. 1961. See Emerigon on Insurance, Meredith's ed. 1850, c. xv, secs. 1-4, pp. 621-37.

[51] Hart v. British M. Ins. Co., 80 Cal. 440.

[52] Watson v. Delafield, 1 Johns. (N. Y.) 150.

covery.[53] It is held that failure to disclose a loss occurring before the contract is reduced to writing and the policy delivered, even though the contract is by parol, is fatal.[54]

§ 1803. Whether Time of Sailing must be Disclosed —Opinions of Text-writers.—Mr. Marshall declares that whatever the insured knows respecting the time of the ship's sailing ought to be fully disclosed, and a concealment thereof vitiates the policy, and in support of this opinion reports two cases wherein Lord Mansfield's language in connection with the facts evidently supports such a rule.[55] This writer also deduces the rule that a fact from which the time of the ship's sailing might be inferred is also material and must be disclosed.[56] Both Mr. Arnould and Mr. Duer, although they do not state the former rule so positively as Mr. Marshall, are nevertheless of the opinion that the same rule is evidently to be deduced from the early English cases, and Mr. Duer, citing the case of Bridges v. Hunter,[57] quotes the words of Le Blanc, J., therein, who says: "I believe it has always been considered that the time of the ship's sailing, if known to the assured, is a material fact to be communicated to the underwriter." Mr. Arnould, however, relying upon the words of Tindall, C. J., declares that the law is well settled that the time of the ship's sailing is not material except the vessel be what is known as a "missing ship." [58] Mr. Duer, while giving substantially the

[53] General Interest Ins. Co. v. Ruggles, 12 Wheat. (U. S.) 408; affirming 4 Mason (C. C.), 74. See secs. 643-649, herein.

[54] Insurance Co. v. Lyman, 15 Wall. (U. S.) 664. Contra, Lishman v. Northern M. Ins. Co., 8 L. R. Com. P. 216; 42 L. J. Com. P. 108; affirmed 10 L. R. Com. P. 179; Cory v. Patton, 7 L. R. Com. B. 304; 41 L. J. Q. B. 195, n.; affirmed, 9 L. R. Q. B. 577; 43 L. J. Q. B. 181. See secs. 107, 643-649, herein.

[55] 1 Marshall on Insurance, ed. 1810, *467, 468, reporting Fillis v. Brutton, and Ratcliffe v. Shoolbred.

[56] 1 Marshall on Insurance, ed. 1810, *467, *468, citing McAndrews v. Bell, 1 Esp. 373; Holt, 572.

[57] 1 Maule & S. 15, decided in 1813.

[58] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 544, 545, *540, sec. 200, citing Elton v. Larkins, 5 Car. & P. 392, per Tindall, C. J., quoting as follows: " 'The law' is now clearly settled that a party is

same rule as Mr. Arnould, qualifies it, however, by saying that the time of the ship's sailing "is not in all cases necessary to be given to the insurer. It must appear from the evidence that the disclosure would have enhanced the premium, or have induced the underwriter to decline the risk, or the concealment is deemed immaterial," and that if the ship is a "missing ship," or "out of time," a disclosure is always necessary, and he still further qualifies the rule by stating that the disclosure is not to be confined to those cases where the ship is "out of time" or a "missing ship," and adds that "whenever the fear or suspicion of disaster exists, the facts on which it is grounded . . . . are material to the risks and ought to be disclosed," including the fact of the time of sailing.[59] Mr. Maclachlan says the question whether the time of the ship's sailing or the time of her being last heard of is a material fact necessary to be disclosed "is often a question of critical and perplexing difficulty," and that no more definite rule than that of the materiality of any fact can be stated he quotes the opinion of Tindall, C. J., [60] referred to above, and declares that in so far as it seems to establish any definite rule on this point, it "must now be considered as set aside" by the cases which he then considers at length, and also that it "is no longer the doctrine of the English courts." [61] Mr. Phillips asserts that it is necessary

'not bound to communicate the time of the sailing of the ship, unless at the time of effecting the policy, or the ship is what is called a missing ship,' i. e., has been so long on the voyage that the owner has reason to suspect she has met with some casualty," referring also to Niele arguendo in the same case. He there considers at length the case for and against.

[59] 2 Duer on Marine Insurance, ed. 1846, 468, et seq., 541, et seq., citing Fort v. Lee, 3 Taunt. 381; Foley v. Maline, 5 Taunt. 430; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170; Elton v. Larkins, 5 Car. & P. 385; Fiske v. New England Ins. Co., 15 Pick. (Mass.) 210; Ratcliffe v. Shoolbred, 1 Park on Insurance, 8th ed., 433; Shirley v. Wilkinson, 3 Dong. 41; Willis v. Glover, 4 Bos. & P. 14; McAndrews v. Bell, 1 Esp. 373; Holt, 572; Webster v. Foster, 1 Esp. 407; Livingston v. Delafield, 3 Caines (N. Y.), 49; Ruggles v. General Int. Ins. Co., 4 Mass. 74, and other cases.

[60] In Elton v. Larkins, 5 Car. & P. 392.

[61] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 562-67, et seq.

to disclose "intelligence or knowledge of the time of the vessel's having sailed, or being expected to sail, or being spoken, where it affords no such ground." [62] Subsequently, however, he qualifies this rule in several cases, making the disclosure dependent upon the materiality of the fact to the risk.[63] Mr. Parsons says the time of sailing or rate of sailing may or may not be material to the risk.[64]

§ 1804. Same Subject—Cases.—The shipper wrote to the consignee, by letter of date November 30th, that he thought the ship would sail the following day, and asking to have insurance made as low as possible on his account. The letter was not received till December 13th, when the policy was effected without making known the contents of the letter. The voyage took from five to ten days, depending upon favorable winds, and it was customary for ships to await in that port for fair winds. The ship actually sailed on December 24th, and the insurance was declared void for concealment.[65] If there has been a severe storm immediately after the vessel sails of which the insured has information and the underwriter not, or if the vessel is a missing ship, the time of her sailing should be disclosed.[66] Another ship had sailed at the same time with the one insured, and the plaintiff effected a policy, but did not state that he had received a letter on the twenty-fourth dated the eighth of the same month, the contents of which were that the ship insured was then ready to sail, and it was held a material concealment.[67] So a failure to make known the contents of a letter stating when the voyage commenced may be material especially when the ship is out of time.[68] The plaintiff was informed by letter that the ship was to sail on the 22d of No-

[62] 1 Phillips on Insurance, 3d ed., 340, sec. 615, citing McAndrews v. Bell, 1 Esp. 373; Webster v. Foster, 1 Esp. 407; Willis v. Glover, 4 Bos. & P. 14; Livingston v. Delafield, 3 Caines (N. Y.), 49; Foley v. Maline, 5 Taunt. 43, and other cases.

[63] 1 Phillips on Insurance, 3d ed., 340-45, secs. 616-23.

[64] 1 Parsons on Marine Insurance, ed. 1868, 498.

[65] Willis v. Glover, 1 Bos. & P. N. R. 14.

[66] Fiske v. New England Ins. Co., 15 Pick. (Mass.) 310.

[67] McAndrews v. Bell, 1 Esp. 373.

[68] Johnson v. Phœnix Ins. Co., 1 Wash. (C. C.) 378.

vember, and the insurance was effected on the 29th of December. The voyage was from Cadiz to London. Held a fatal concealment.[69] A vessel which had sailed two days before the insured ship, arrived three days before the insurance was effected. This fact, as well as the day of sailing of the insured vessel, was disclosed, but the plaintiff did not disclose the fact that on the same day another ship had arrived which had sailed three days before the insured vessel. The insurers claimed a material concealment, but the court, upon evidence that the ships which arrived were both fast sailers and coppered, and that the insured vessel was not coppered, was full built, and a slow sailer, and that the fact could not have increased the premium, and that she could not be considered a missing ship, held that there was no material concealment.[70] Where the ship has not been out the full length of time which such a ship on such a voyage usually takes, the time of her sailing is not material.[71]

§ **1805. Same Subject—The General Rule.**—As the law now stands the time of the ship's sailing may or may not be material. It not infrequently happens that either by itself or

[69] Elton v. Larkins, 5 Car. & P. 392. See comments on this case under preceding section.

[70] Littledale v. Dixon, 1 New Rep. 151.

[71] Under the above rules it was held in the following cases that there was no concealment: Foley v. Moline (1814), 5 Taunt. 430; Fiske v. New England Ins. Co. (1834), 15 Pick. (Mass.) 310; Elkin v. Jansen (1845), 13 Mees. & W. 655; Fort v. Lee (1811), 3 Taunt. 381; Mackay v. Rhinelander (1800), 1 Johns. Cas. (N. Y.) 408; McLanahan v. Universal Ins. Co. (1828), 1 Pet. (U. S.) 188; Rice v. New England Ins. Co. (1827), 4 Pick. (Mass.) 439. In the following cases, that there was a concealment: Baxter v. New England Ins. Co. (1822), 3 Mason (C. C.), 96; Bridges v. Hunter (1833), 1 Maule & S. 18; Ely v. Hallett (1804), 2 Caines (N. Y.), 57; Mackintosh v. Marshall (1843), 11Mees. & W. 119, per Maule, J.; Richards v. Murdock (1830), 10 Barn. & C. 527; Shirley v. Wilkinson (1781), 3 Doug. 41; 1 Doug. 306, n. (held a concealment, as it might have influenced the premium); Stribley v. Imperial M. Ins. Co., 1 Q. B. D. 507; Webster v. Foster, 1 Esp. 406 (held a concealment, as the ship must have been reported as missing); Ratcliffe v. Shoolbred, reported in 1 Marshall on Insurance, ed. 1810, *468 (held a concealment, as the ship was represented on the coast on a certain day when she had in fact sailed on that day).

in connection with other facts the day and fact of sailing would be a very important circumstance in aiding the underwriter's judgment, and it may undoubtedly be proven that the same was material. In cases where it is material, it should be disclosed. No definite rule upon the question can, however, be positively stated. Whether the day or fact of sailing is material depends upon the nature, purposes, and length of the voyage, usages of trade as to navigation, the existing political situation, the time or season of the year, the prevalence of storms, and other matters difficult, if not impossible, to specify. If there was a severe storm immediately after the ship sailed, or if the ship was missing or out of time, or if in times of war the ship's departure was watched by a hostile vessel, such additional facts would in all probability make the time of sailing material, and the concealment thereof the evidence of a fraudulent intent. So the fact or time of sailing would generally be material if the disclosure of the same would have increased the liability to loss, and have induced a reasonable and prudent underwriter to have refused the risk or have charged a higher premium, within the limitations and conditions embodied in the general rule already stated as to what should be disclosed.[72]

§ 1806. Underwriter Presumed to Know Causes which Occasion Natural Perils.—The underwriter is bound know every cause which may occasion natural perils, such as the recurrence and kinds of seasons, the probable difficulties of the voyage arising from winds, weather, lightning, earthquakes, storms, and the like, from the security or insecurity of certain ports, and other like matters.[73]

[72] McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, per Story, J.; Fiske v. New England M. Ins. Co., 15 Pick. (Mass.) 310, per Putnam, J.; Foley v. Maline, 5 Taunt. 430, and authorities noted under the two preceding sections, and rule stated in sec. 1793, herein.

[73] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, per Lord Mansfield, noted at length under sec. 1845, herein, note. That it is not necessary to prove things that must have happened according to the ordinary course of nature, such matters being so far those of general knowledge that courts will take judicial notice thereof, see 1 Greenleaf on Evidence, 14th ed., 9, citing Rex v. Leuffe, 8 East, 202; Fay v. Prentice, 9 Jur. 876; Ross v. Boswell, 60 Ind. 235; Tomlinson v.

§ 1807. Restrictions on Commerce—Commercial and Foreign Regulations.—The assured is not bound to communicate a circumstance made material by a foreign ordinance of which he has no knowledge and which he is under no obligation to know, especially if the ordinance be one contrary to the law of nations; nor need he disclose restrictions upon commerce, public transactions, foreign laws, or ordinances relating to matters of revenue or protection[74] which are general, well established, and notorious, and of which the underwriter should be equally as well informed as himself. But if the ordinance or prohibition be one recently enacted, or one not established, and the assured has actual knowledge thereof, the rule would be otherwise. The above rules rest upon the fact that commercial regulations and foreign ordinances may not infrequently very materially affect the risk or liability of the underwriter to loss, in that the property may be liable by reason thereof to seizure, etc. It also rests upon the fact that the nature of the trade and the circumstances under which it is carried on must be considered as entering into the contemplation of the parties to every contract of insurance.[75] In case the property

Greenfield, 31 Ark. 557. See Deering's Annot. Civ. Code. Cal., sec. 2566, noted in sec. 1808, note, herein.

[74] "Every sovereign has the right to prohibit within his states the importation and exportation of particular articles of merchandise, without foreigners, who have the same privilege at home, having the right to constrain": Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 5, p. 170. It will not be irrelevant to notice here the leading case of Gibbons v. Ogden, 9 Wheat. (U. S.) 1, wherein it is held that the acts of laying "duties or imposts on imports and exports" is a branch of taxing power under the constitution of the United States. The power to regulate commerce is in a separate clause of the enumeration of powers, and is distinct from the right to levy taxes and imposts. The power to regulate commerce and of taxation are separate and distinct. Duties of this character imposed with a view to revenue are under the taxing power, and the same is true as to duties imposed on tonnage, although they may be imposed with a view to regulate commerce, per Marshall, C. J.

[75] Calbraith v. Gracie, 1 Wash. (C. C.) 219, per Washington, J.; Hoyt v. Gilman, 8 Mass. 336; Parker v. Jones, 3 Mass. 173; Pollock v. Babkock, 6 Mass. 234, per, Parke, J.; Blagge v. New York Ins. Co., 1 Caines (N. Y.), 549; Mayne v. Walter, reported in 1 Marshall on Insurance, ed. 1810, 397. The ship here was warranted Portuguese. It had an English supercargo on board, contrary to a recent French

insured is subject to the probable or possible application of a regulation, ordinance, or decree of a foreign belligerent, not consistent with the law of nations, or one known only to the insured, he should disclose the same and the facts rendered material in consequence, and such facts so rendered material should also be disclosed, even though the regulations are public in their nature. If such regulations are known only to the underwriter, he assumes all the consequent or attendant risks if he insures without inquiry as to facts rendered material by such regulations, but if assured also knows of such regulations, he must disclose such facts as may be material. And if the property would be subjected to an increased liability to loss by rules of decision of foreign courts known only to the assured, such rules and facts rendered material thereby should be disclosed.[76]

Ordonnance, and Lord Mansfield declares that "this is an arbitrary and oppressive regulation, contrary to the law of nations. But as neither the insured nor the underwriters knew anything of it, neither of them was guilty of any fault. If the insured had known of it, he might have taken care to conform to it. If the underwriters had known of it, they ought to have inquired who was the supercargo," and that both being innocent, the underwriters were liable: Barnewell v. Church, 1 Caines (N. Y.), 217; Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506; Seton v. Delaware Ins. Co., 2 Wash. (C. C.) 175; Kohne v. Insurance Co. of North America, 1 Wash. (C. C.) 158, per Washington, J.; Lever v. Fletcher, reported in 1 Marshall on Insurance, ed. 1810, 61; Park on Insurance, 8th ed., 507, where it was said that if the underwriters know that it is the intention of the insured to carry on a smuggling trade with Spain, it was a fair contract, as no country paid attention to the revenue laws of another country, per Lord Mansfield; but the jury found for the defendant on another ground: See in connection with this last case, The Eurona, 2 Rob. Adm. Rep. 6, per Sir William Scott; Planche v. Fletcher, Doug. 238; Androus v. Essex Ins. Co., 3 Mason (C. C.), 6, per Story, J.: Archibold v. Mercantile Ins. Co., 3 Pick. (Mass.) 69; Parker v. Jones, 3 Mass. 173; McFee v. South Carolina Ins. Co., 2 McCord (S. C.), 503; Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141.

[76] Kohne v. Insurance Co. of North America, 1 Wash. (C. C.) 93, per Washington, J.; s. c., 6 Binn. (Pa.) 219; Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243, per Washington, J. "Did the letter of instruction to the master expose the property to a risk not contemplated by the policy? If it did, then the policy is void. If not so, still the danger of capture and loss was as certain as if the rule laid down had been in all respects correct. This rule was that a vessel

§ 1808. Underwriter Presumed to Know Causes which Occasion Political Peril.—The underwriter is bound to know every cause which may occasion political peril, general and notorious facts as to peace or war, ruptures, and political dissensions or allegiance of particular countries, the operations of war, the course and directions of hostilities, and the consequent probabilities of safety or danger; to be acquainted with the general risks affecting commerce with particular countries, with established mercantile regulations, the probabilities in general with reference to the course of trade and its character, and the attendant risks of capture or seizure by hostile or belligerent powers, as regulated by treaties with his own country, by general decrees of belligerents, and rules of international law. But nothing in this rule excuses the assured from disclosing material facts relating to recent and changing decrees of foreign powers of which the underwriter has no actual or legally presumptive knowledge, and of which the assured has actual knowledge.[77]

destined to a blockaded port, and so known to be before she sailed with instruction to go elsewhere only in case of her being turned away, is considered as guilty of a breach of blockade, and subject to confiscation. This rule was known to the insured, and should have been to the underwriters, but whether the vessel was placed in a situation where the rule would apply was known only to the insured": Hoyt v. Gilman, 8 Mass. 336.

[77] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, where Lord Mansfield says: The underwriter "is bound to know every cause which may occasion political perils from the ruptures of states, from war, and the various operations of it. He is bound to know the probability of safety from the continuance or return of peace, from the imbecility of the enemy, through the weakness of their councils, or their want or strength, etc": Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 160, per the court; Kohne v. Insurance Co., 1 Wash. (C. C.) 158; 6 Binn. (Pa.) 219; De Longuemere v. New York Ins. Co., 10 Johns. (N. Y.) 120. In this case it was said by the court: "Whether the rate of premium might not have been higher had the defendants sufficiently informed themselves of the risk of the voyage is a point not open for inquiry, so long as there was no undue concealment on the part of the plaintiff": See Sperry v. Delaware Ins. Co., 2 Wash. (C. C.) 243; Hoyt v. Gilman, 8 Mass. 336, and see cases under last section. "Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated": Deering's Annot. Civ. Code Cal., sec. 2566.

§ 1809. Degree of Publicity which will Bind Underwriter with Knowledge of Material Fact.—There are many matters which the assured is not obligated to disclose, because the underwriter has actual knowledge thereof, or because they are facts which the underwriter ought to know, and is therefore presumed to know, or matters of information or intelligence so public in their nature as to be equally open to the underwriter and the assured.[78] There are extensive means of information available to underwriters, especially at Lloyds, where the system in this respect is most extensive and efficient. The rule, however, above given involves the question as to what degree of publicity will be presumed to exist, with reference to these extensive and available means of information, so as to determine what the underwriter is presumed to know and what the assured need not disclose. The mere fact of publication in a public newspaper of intelligence ought not, unaided by other proof, to bind the underwriter or raise any presumption not subject to rebuttal against him. Nor does it seem consistent with the reason of the law that the underwriter should in all cases be presumed to be acquainted with all the intelligence contained in newspapers taken by him. If, however, the insurer subscribes to and regularly receives, a public newspaper at his office which contains marine intelligence, or a paper devoted almost wholly, if not exclusively, to such matters, it cannot be an unfair or unreasonable presumption that he or his authorized agent will examine with some degree of care such a source of information designed as the medium of communication of the latest marine intelligence available. To go farther, if it were proven that such a paper containing the intelligence in question was subscribed to and received sufficiently long before the insurance was effected to warrant the

[78] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, per Lord Mansfield; Norris v. Insurance Co. of North America, 3 Yeates (Pa.), 84; Pins v. Lewis, 2 Fost. & F. 778; De Longuemere v. New York Ins. Co., 10 Johns. (N. Y.) 120, 126. "Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other: 1. Those which the other knows; 2. Those which in the exercise of ordinary care the other ought to know, and of which the former has no reason to suppose him ignorant," etc.: Cal. Civ. Code, sec. 2564.

presumption that it was so examined, it ought, in the absence of evidence in rebuttal, to be sufficient to bind the underwriter with knowledge of the intelligence, or at least to excuse the insured from disclosing the same, but such presumption would undoubtedly be always open to rebuttal.[79] Under the California code neither party is bound to communicate information "which in the exercise of ordinary care the other ought to know, and of which the former has no reason to suppose him ignorant." [80] This would seem to reasonably warrant the presumption that the insurer has knowledge of matters of public notoriety such as are here under consideration, when by ordinary care he might have known them; but this rule if true ought not to exclude proof that the matters were of public notoriety in the place, or, if contained in newspapers, that they were available and at the hand of the underwriter. The rule in Massachusetts is evidently this, that if it be proven that such a newspaper was so subscribed to and received at the office, the general presumption is that agents of the office will examine with some care the items of marine intelligence contained therein, and if such intelligence was actually seen by the underwriter or an official of the company; or if circumstances are

[79] Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 451; Merchants' Ins. Co. v. Paige, 60 Ill. 448; Ruggles v. Commercial Ins. Co., 4 Mason (C. C.), 81, per Story, J.; 3 Kent's Commentaries, 285; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 568, *564, sec. 209; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 584, et seq.; 1 Phillips on Insurance, 3d ed., 335, secs. 605, 606; 2 Duer on Marine Insurance, ed. 1846, 478-82; 1 Parsons on Marine Insurance, ed. 1868, 478, et seq. See Mackintosh v. Marshall, 11 Mees. & W. 116. The Roman law says that a person is not to be presumed ignorant of what is known to all the inhabitants of the town where he dwells. Quid enim si omnes in civitate sciant quod ille solus ignorat? Again, that he is not to be presumed ignorant of what is manifested in public advertisements. Valin and Pothier say that "the limitation runs from the time at which the news has begun to be public and notorious in the place where the insurance has been made." This is applied to the assured, however, in case of news of loss: Emerigon on Insurance, Meredith's ed. 1850, c. xv, sec. 3, p. 634. It is also said that the news of the loss must be proven to have been known, but not that the assured knew it: Emerigon on Insurance, Meredith's ed. 1850, c. xv, sec. 3, p. 634.

[80] Deering's Annot. Civ. Code Cal., sec. 2564.

shown from which the reasonable presumption may arise that the underwriter had actual knowledge of the information contained in such public newspaper, and such presumption is not rebutted, then the fact of actual knowledge may be properly found by the jury, and render a disclosure thereof by the assured unnecessary, and that underwriters are not under all circumstances to be presumed to be acquainted with all the intelligence contained in papers taken at their office.[81] The rule first stated relates, however, to general intelligence where its applicability to the risk is a matter of which the assured has no greater knowledge than the underwriter; but assume a case where the information was known by the assured to be peculiarly applicable to the risk which he asks the underwriter to assume, and the intelligence was of the most general character, then there would seem to be no doubt but that the facts which make such information material should be disclosed, or that the applicability of the intelligence should be stated. Such a doctrine would rest upon general principles, for the assured's knowledge would be more particular than that of the underwriter.[82] If, however, the assured has no peculiar or particular knowledge which would make the general information material, the fact that the news is general and of no particular application, and of a character concerning which the underwriter may form his own opinion as to its applicability, would not make its disclosure necessary; for, as we have already stated, the assured need not disclose his fears, hopes, or apprehensions.[83]

§ **1810. Same Subject—The English Rule.**—The question has been much discussed, with some conflicting conclu-

[81] Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402. See Dickinson v. Commercial Ins. Co., Anth. N. P. (N. Y.) 92, per Van Ness, J.

[82] Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 40, 197; Nicholson v. Power, 20 L. T., N. S., 580. See the case of Moses v. Delaware Ins. Co., 1 Wash. (C. C.) 385, noted under sec. 1795, herein; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 568, *564, sec. 209; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 584.

[83] See sec. 1796, herein; Bates v. Hewitt, L. R. 2 Q. B. 595; 3 Kent's Commentaries, 285; Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 40, 197, per Bramwell, B.; Friere v. Woodhouse, 1 Holt, 572; Alsop v. Commercial Ins. Co., 1 Sum. (C. C.) 41, per Story, J.

sions, in England as to what degree of publicity will be presumed to exist with reference to "Lloyds' Lists" and public newspapers, so as to determine what the underwriter who has access to or receives such intelligence will be presumed to know, and what it is or is not incumbent upon the assured to disclose. A careful examination of the English cases and opinions will discover the difficulty that arises in attempting to formulate a rule. The earlier English cases relied on hold that the underwriter who is a member or subscriber at Lloyds is presumed to have consulted the lists, upon the ground that what he may by due diligence and a fair inquiry ascertain from the ordinary sources of information need not be disclosed, and that these lists are admissible as evidence against the underwriter on this ground upon a question of concealment.[84] And this rule has been carried to the extent that where a vessel has registered at Lloyds as "A1," and the name was stricken from the register because the owner refused compliance with a requirement that a vessel should be examined, it was held that the insurer ought to have known that her continuance in the class depended upon whether the usual survey had been made, and that this knowledge was sufficient to have put him on inquiry.[85] An anonymous communication was posted at Lloyds, stating the intention of the owners to lose the vessel on her next voyage. The insured property was indorsed and shipped on the vessel, and it was held a failure to disclose was fatal.[86] In another case which we will consider under the next section the court did not deny the rule, but adhered to the principle above stated relative to a presumption against the insurer in such cases, and distinguished the case before it, holding that the rule did not apply to the facts under consideration.[87] It was intimated, however, by Lord Abinger that the presumption

[84] Friere v. Woodhouse, 1 Holt N. P. 572, per Burroughs, J., decided in 1817; Foley v. Tabor (1861), 2 Fost. & F. 663; Elton v. Larkins (1831), 5 Car. & P. 86; 8 Bing. 198; Nicholson v. Power, 20 L. T. N. S., 580. As to foreign lists, quaere, see Elton v. Larkins, 5 Car. & P. 85; 8 Bing. 198.

[85] Gandy v. Adelaide Mut. Ins. Co. (1871), 6 L. R. Q. B. 746; 40 L. J. Q. B. 239.

[86] Leigh v. Adams, 25 L. T. N. S., 566.

[87] Bates v. Hewitt, L. R. 8 Ex. 40, 697, per Shee, J.

that the underwriter had looked at the lists is subverted where the amount of the premium is such that it may be reasonably concluded that he would never have taken such a premium had he examined the lists. The case, however, rested upon false representation.[88] Another decision, however, which has been relied on presents such facts that, taken with the opinion therein, the general rule may fairly be deduced therefrom that a presumption may exist binding the underwriter prima facie to a general knowledge of general intelligence so conveyed; but if it is attempted to apply his knowledge to any particular ship, no presumption of knowledge exists against him sufficient to excuse a disclosure on the part of the assured assuming that he has or ought to have knowledge. It is declared that it would be a difficult and useless burden upon the underwriter to require that he shall carry in his head intelligence of such a character so that he may be enabled to apply it to some particular ship in which at the time he has no interest, and that to require a disclosure from the assured would obviate the difficulty and impose no unnecessary burden upon him.[89]

§ 1811. Same Subject.—The Case of Bates v. Hewitt. In connection with the subject noted above the case of Bates v. Hewitt[90] cannot be passed by merely citing the same, because of the criticism of Mr. Parsons thereon, and also for the reason that the opinions of the judges therein do not in the language used deny the doctrines of the earlier cases, but distinguish the case from the ruling that information contained in "Lloyds' Lists" need not be communicated to the underwriter when by fair inquiry and due diligence he could have ascertained the facts therein contained. The case is also of further interest from the fact that the judges assert an adherence to the established principle that the assured having especially within his knowledge a fact material to the risk which the underwriter does not know, must disclose the same, and that the

[88] Mackintosh v. Marshall (1843), 11 Mees. & W. 116, per Lord Abinger, C. B. See Dickinson v. Commercial Ins. Co. (1808), Anth. N. P. (N. Y.) 92.

[89] Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 40, 197.

[90] L. R. 2 Q. B. 595.

assured need not disclose matters which are well known to both, or facts and circumstances within the ordinary professional knowledge of the underwriter, and notwithstanding their express declaration of adherence to what they specify as established principles, or what they tacitly admit to be decided law, nevertheless they do by their ruling assert what is substantially a new principle, if it be considered apart from the facts of this particular case. But the question may be open to discussion whether they did intend to establish a new principle. The case was briefly this: The defendant was an underwriter at Lloyds. The policy was effected upon the steamship "Georgia," which had been a confederate cruiser in 1863-64, which fact, as well as the one that she had been dismantled and laid up at Liverpool, was notorious at the time through public newspapers and published debates of the House of Commons, and these facts were then known to the underwriter. At the exact time, however, of effecting the insurance she was not posted at Lloyds. The vessel was merely insured as the "Georgia Steamship, chartered" for a specified voyage, without disclosing her character as a cruiser, and there was nothing which indicated to the underwriter, nor did it occur to him, that the steamship insured was the cruiser. The ship was captured, and the jury found as a fact that the assurer did not know that the vessel insured had been a confederate cruiser, and it was declared that the underwriter was not bound by his previous knowledge, the fact as to the ship's character being absent from his mind at the time of insuring, and therefore the failure to disclose was fatal to a recovery. Mr. Parsons' criticism on this case is as follows: "The facts may perhaps justify the verdict, but the principles of insurance law have not yet led to the conclusion that if the insurer knew a fact and did not think of it while making the insurance or did not think it material enough to take into consideration, the noncommunication of the fact would discharge him. But the language used by the court in deciding this case would go almost if not quite as far as this." [91] If it be conceded that the language of the judges go to the extent believed by Mr. Parsons, then it can-

[91] 1 Parsons on Marine Insurance, ed. 1868, 481.

not but be admitted that there is much force in his criticism, but we do not so construe the opinions given. Decisions made, and the language of courts used with reference to the special circumstances of a given case, ought to be carefully considered before they can be held to establish a new principle, especially one at variance with, or an exception to, general rules. And the courts expressly disclaim a departure from, and unequivocally assert an adherence to, general principles. Again, the principal factor seems to have been that the assured had especial knowledge of a fact material to the risk. Good faith required that he should inform the underwriter of all material facts. General knowledge that there was a confederate cruiser "Georgia" would not be held to be particular knowledge that the "Georgia Steamship" was necessarily the same vessel, and in fact it had been bought by the plaintiff and converted into a merchant vessel. The decision, in view of all the facts, does not impose upon the assured any greater burden than that he should exercise good faith and disclose to the assurer material facts of which he has particular knowledge. It will be noticed in this case that the jury found that the assurer did not know that he was underwriting what had been a confederate cruiser, and the court says: "This was a fact material to the risk which the person proposing the insurance knew, and which the person to whom the insurance was proposed did not know."

§ 1812. Same Subject—Opinions of Mr. Arnould and Mr. Maclachlan.—Mr. Arnould concludes from an examination of the cases[92] that London underwriters are presumed to be acquainted with the intelligence contained in "Lloyds' Lists." Mr. Maclachlan concludes from an examination of the cases "against any presumption of knowledge of particular facts concerning particular ships on the part of the underwriter merely on the ground that such facts have appeared in 'Lloyds' Lists,' or the 'London Gazette,' or a newspaper." [93]

[92] Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 40, 197, and Bates v. Hewitt, L. R. 2 Q. B. 595, are not noted by him.

[93] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 565, *562, sec. 208; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 581,

§ **1813. Usage Need not be Disclosed.**—General, established, and notorious usages are presumed to be known to the underwriter, and need not be disclosed; so also as to the nature and circumstances of the trade involved and the usual course of loading or unloading at particular ports, or a usage to prolong the ship's stay.[94]

§ **1814. Exceptions to Last Rule.**—But this rule does not excuse a disclosure of facts of which the underwriter has no knowledge, and which make the application of the usage material; as where the usage relates to the mode of transporting goods of a certain class, the kind of goods ought to be disclosed, or else the fact ought to be stated that they are goods subject to the usage claimed with certain exceptions, as in case of trading voyages with shifting or successive cargoes, or time policies wherein the underwriter assumes the risk of every valid usage of the trade in which the ship may be employed.[95]

§ **1815. Ownership of Vessel Need not be Stated when not Material and Insurance is on Cargo.**—It is not necessary for the assured, when no inquiry is made and the fact is not material and the policy is on cargo, to state the ownership of the vessel on which the goods are to be transported in

et seq. Mr. Maclachlan deduces his opinion from the two cases referred to in the last note. See, also, 2 Duer on Marine Insurance, ed. 1846, 554, et seq.; 1 Parsons on Marine Insurance, ed. 1868, 477, note, 478-81, and notes, 491, note. "It would appear that the underwriter is not bound to know everything which has appeared in the public press, with respect to a risk offered to him": McArthur on Marine Insurance, ed. 1890, 10.

[94] Norris v. Insurance Co. of North America, 3 Yeates (Pa.), 84; Long v. Bolton, 2 Bos. & P. 210; Kingston v. Knibbs, 1 Camp. 508; Salvador v. Hopkins, 3 Burr. 1707; Vallance v. Dewar, 1 Camp. 503; Maryland etc. Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Hoskins v. Pickersgill, reported in 2 Marshall on Insurance, ed. 1810, *727; Tennant v. Henderson, 1 Dowl. Pr. C. 324; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506; Stewart v. Bell, 5 Barn. & Ald. 238. Both parties are bound to know "all general usages of trade": Deering's Annot. Civ. Code Cal., sec. 2566. See sec. 239, herein.

[95] 1 Duer on Marine Insurance, ed. 1845, 204, sec. 51, 250; 2 Duer on Marine Insurance, 446, 447, citing Coggeshall v. American Ins. Co., 3 Wend. (N. Y.) 283; Milward v. Hibbert, 3 Ad. & E., N. S., 123.

his application. Such nondisclosure will not vitiate the policy.[96]

§ **1816. Nature and Condition of Cargo.**—As a general rule the assured need not disclose to the underwriter the nature, state, or condition of the cargo intended to be carried. This is a matter of inquiry by the underwriter.[97] Nor need the damaged condition of perishable goods be stated.[98] Mr. Maclachlan is of the opinion that "the nature of the cargo . . . . may be most material to be communicated; for without exactly rendering the ship unseaworthy, a cargo may be of a nature less desirable for safety than another, owing to the dead weight in proportion to bulk, or its tendency to shift, its unwieldiness for storage, or its gaseous or other dangerous chemical and inflammable qualities, and the like." [99]

§ **1817. Cases where Entire Contract is not Vitiated, but Only that Part Relating to Risk Concealed.**—Under the California code the underwriter is merely exonerated from the risk concealed. The entire contract is not vitiated in case of a concealment of the national character of the insured; the liability of the thing insured to capture and detention; the liability to seizure from breach of foreign laws of trade, the want of necessary documents, and the use of false and simulated papers.[100] This code provision, so far as it enumerates the risks, is taken verbatim from Mr. Duer's work on Insurance, wherein he lays down the proposition as that of the common law.[101]

§ **1818. Whether It Need be Disclosed that Goods are Contraband—Belligerent Risks—Neutral—National Character.**—It is held in New York that goods contraband of

[96] Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595.

[97] Duplanty v. Commercial Ins. Co., Anth. N. P. (N. Y.) 114; Chesapeake Ins. Co. v. Allegre, 2 Gill & J. (Md.) 136, 164; 20 Am. Dec. 424; Boyd v. Dubois, 3 Camp. 133, per Lord Ellenborough. But see Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 427; Allegre v. Maryland Ins. Co., 8 Gill & J. (Md.) 190; 29 Am. Dec. 536. But see sec. 1813, herein, latter part.

[98] Boyd v. Dubois, 3 Camp. 133.

[99] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 576.

[100] Deering's Annot. Civ. Code Cal., sec. 2672.

[101] 2 Duer on Marine Insurance, ed. 1846, 588, et seq.

war are lawful, and the insured need not disclose their character as such.[102] Chancellor Kent, however, declares the cases so holding to be without authority,[103] and the general rule seems to be that the insurer must expressly undertake such insurance, or must know from the kind of goods or from a disclosure that they are contraband, or must otherwise have full knowledge thereof, or of the trade, in order to render him liable for their seizure and confiscation, although the fact in itself that the ship is bound on a contraband voyage will not void the policy, and the assurer will be liable as to other risks against which he has insured.[104] In a federal case the facts were substantially these: The insured goods of an American merchant destined to a Spanish port were captured by the British and condemned. The goods were originally Spanish goods, but had been sold in good faith to a third party, from whom the insured had obtained his title in good faith. The original Spanish owner was a passenger on the ship, and it was claimed that these facts should have been disclosed; the verdict, however, was for the plaintiff.[105] Again, insurance was effected on a vessel "at and from Charleston to Marseilles, and at and from thence to Havana." Another policy was made on the same day on the cargo "from the loading thereof at Charleston." In the offer of the insured on which both policies were effected every material circumstance was said to be disclosed.

[102] Seton v. Leon, 1 Johns. Cas. (N. Y.) 1; Skidmore v. Desdorty, 2 Johns. Cas. (N. Y.) 77; Juhel v. Rhinelander, 2 Johns. Cas. (N. Y.) 120; affirmed Rhinelander v. Juhel, 2 Johns. Cas. (N. Y.) 487; De Peyster v. Gardner, 1 Caines (N. Y.), 492.

[103] 3 Kent's Commentaries, 5th ed., 268.

[104] Richardson v. Marine Ins. Co., 6 Mass. 102, per Parsons, C. J.; Parker v. Jones, 13 Mass. 173; Cook v. Essex F. & M. Ins. Co., 6 Mass. 122; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151. See Browne v. Shaw, 1 Caines (N. Y.), 489; Maryland etc. Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; Bauduy v. Union Ins. Co., 2 Wash. (C. C.) 391. See Kohne v. Insurance Co. of North America, 6 Binn. (Pa.) 219; 1 Wash. (C. C.) 93; Maryland Insurance Co. v. Bathurst, 5 Gill & J. (Md.) 159. See, also, Skidmore v. Desdorty, 2 Johns. Cas. (N. Y.) 77; Goix v. Knox, 1 Johns. Cas. (N. Y.) 337; Radcliffe v. United Ins. Co., 7 Johns. (N. Y.) 46.

[105] Marshall v. Union Ins. Co., 2 Wash. (C. C.) 527, per Washington, J.

The vessel had been laden at Havana and had touched at Charleston, where the goods were not landed, and the manifest showed they were shipped in the names of Spaniards. It was held that an omission to disclose these facts (Spain and her colonies being then at war) was not such a concealment of material circumstances as vitiated the policy.[106] It is held that where the insured is engaged in carrying on a trade in a belligerent country, and fails to disclose the belligerent character of the risk at the time of the insurance, he cannot recover under a policy "for whom it may concern."[107] But the rule is now considered as settled here that in case of an insurance "for whom it may concern," or words of like import, the fact that the owner is a belligerent need not be disclosed.[108] At a time when the war of 1812 was imminent and anticipated between Great Britain and this country, the insured, an American subject, effected a policy upon a ship and goods, which were his property, from London to ports in America "against all risks, American capture and seizure included." At the time of effecting the policy hostilities had been declared, but this fact was not then known in England. No disclosure was made as to the national character of the assured, nor did the underwriter know that the property was American property. The ship was seized by the government here upon its arrival, and upon an action against the assured the concealment was held fatal to a recovery. The opinion of the judges in declaring the ground of this decision has been the subject of much discussion and adverse comment in this country, and has been declared to have no weight as an authority.[109] Where the insurance covers law-

[106] Union Ins. Co. v. Stoney, 4 McCord (S. C.), 511; overruling 3 McCord (S. C.), 387; Harper (S. C.) 235.

[107] Bauduy v. Union Ins. Co., 2 Wash. (C. C.) 391, per Washington, J.; Stocker v. Merrimack Ins. Co., 6 Cranch (U. S.), 274. See Juhel v. Rhinelander, 2 Johns. Cas. (N. Y.) 120.

[108] Hodgson v. Marine Ins. Co., 5 Cranch (U. S.) 100; Seamans v. Loring, 1 Mason (C. C.), 127; Murray v. United Ins. Co., 2 Johns. Cas. (N. Y.) 263; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; Maryland etc. Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159.

[109] Campbell v. Innes, 4 Barn. & Ald. 426. And see, also, Simeon v. Bazett, 2 M. & S. 94; Touting v. Hubbard, 3 Bos. & P. 291; Conway v. Gray, 10 East, 536. See adverse criticism in McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 299, per Kent, C. J.; Francis v. Ocean Ins.

ful goods, and the underwriter knows that contraband goods are shipped on board the same vessel, he assumes the consequent risk, and if the goods are seized and condemned, the underwriter is liable.[110] In cases of warranty exempting the insurer from losses from illicit trade or trade in contraband of war, and the assured knows that such goods are intended to be laden, he should disclose the fact in order to receive protection to his own goods, provided the construction of this clause be held to be limited to the property insured, although if such warranty be construed as an absolute exception of the risks specified, without regard to their source or cause, and the assured has knowledge of the existence of the risks, he ought to disclose the facts, and by alteration of the terms of the policy have the risks covered which he wishes, otherwise they will be excluded.[111] And it is also declared that circumstances which are the grounds of condemnation by established adjudications of belligerent courts, even though not generally known, and though in opposition to the law of nations, must be disclosed if known to the assured.[112]

§ 1819. Presumption concerning Underwriter's Knowledge of Ports and Places.—The underwriter is presumed to have a knowledge of the nature and situation of places with relation to which the contract is made, and that the word

Co., 6 Cow. (N. Y.) 404, per Sutherland, J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 320, per Washington, J. Mr. Duer has exhaustively reviewed the cases, and distinctly denies the authority of the English cases, subject to such exception as may exist in the case of a loss which may arise from a deliberate violation by the assured of the laws of his own country, and he also decides that if the national character of the assured named in the policy would increase the risk, it ought to be disclosed: 2 Duer on Marine Insurance, ed. 1846, 589-601.

[110] Bonne v. Shaw, 1 Caines (N. Y.) 489. See Cucullu v. Orleans Ins. Co., 18 Mart. (La.) 11; Hodgson v. Marine Ins. Co., 5 Cranch (U. S.), 100. See De Peyster v. Gardner, 1 Caines (N. Y.), 492. See Barker v. Blake, 8 East, 283.

[111] 2 Duer on Marine Insurance, ed. 1846, 631, et seq. See chapter herein on excepted risks.

[112] Marshall v. Union Ins. Co., 2 Wash. (C. C.) 357, per Washington, J.

"port," although it usually means a harbor, is not always used strictly in that sense, and where it is a matter of fact and general notoriety that certain ports or places are merely open roadsteads or anchorage places, and not sheltered harbors, such fact need not be disclosed. This was so held in a case where the insurance was on "ship to the port of Sisal." [113] So the underwriters are presumed to know the depth of water in certain harbors,[114] and that there are no pilots on certain coasts.[115]

§ 1820. Repairs Consequent upon Outward Voyage.—The need of repairs consequent upon an outward voyage is not necessary to be stated under an insurance homeward.[116] Nor need it be disclosed that the ship must remain at a foreign port for repairs beyond the time necessary to take in her cargo.[117]

§ 1821. Disclosure of Interest in Ship or Goods.—The interest of the assured in the ship or goods may be of such a character that its concealment would operate as a fraud upon the underwriter, or would be material or necessary to be disclosed within the limits of the rule that requires the assured to disclose all facts within his knowledge which may affect his judgment in accepting or rejecting the risk or charging the premium.[118] But it need not be disclosed that one whose name is not upon the customhouse documents or bill of sale is interested in the ship,[119] nor that the master sailed the vessel on

[113] De Longuemere v. New York F. Ins. Co., 10 Johns. (N. Y.) 120, 126.

[114] Patterson v. Dugind, Bell's Sess. Cas. 281.

[115] Neilson v. Louis Ins. Co., 5 Mart. (La.), N. S., 289.

[116] Shoolbred v. Nutt, reported in 1 Marshall on Insurance, ed. 1810, *475. See sec. 1824, herein.

[117] Beckwith v. Sydebotham, 1 Camp. 116. See Haywood v. Rodgers, 4 East, 590.

[118] Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507. "Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry," although the policy must specify "the interest of the insured in property, if he is not the absolute owner thereof": Deering's Annot. Civ. Code Cal., secs. 2568, 2587. See sec. 1793, herein.

[119] Bixby v. Franklin Ins. Co 8 Pick. (Mass.) 86.

shares and was the owner pro hac vice,[120] nor that he was part owner.[121] Although where one of the company's agents was with others authorized to effect policies at a certain place on marine risks, on which if not rejected by the company the agents were to receive a commission, and a risk was taken on a steamship in which the agent was a part owner, and the fact was purposely concealed, it was held that even though immaterial, it was a fraudulent concealment vitiating the contract.[122]

§ **1822. Must an Equitable Title be Disclosed.**—There is a conflict of authority upon the point whether it is necessary for one who is merely the equitable owner of ship or goods to disclose the nature of his interest, or whether the same is covered by general words in the policy. In Massachusetts, it is declared that such an interest may be insured generally as property, although the legal ownership is in another, upon the ground that neither in England or in that state had such a representation been deemed essential in any of the decided cases, and the underwriter could not be injured by an adherence to what appeared to be the generally understood construction of the law, and the assured's remedy would be confined to an actual indemnity where he cannot by abandoning transfer the legal title to the underwriter, and, in the absence of inquiry, the special nature of the insured's title need not be disclosed.[123]

[120] Russ v. Waldo Mut. Ins. Co., 52 Me. 187.

[121] Turner v. Burrows, 8 Wend. (N. Y.) 144; 5 Wend. (N. Y.) 541.

[122] Ritt v. Washington M. & F. Ins. Co., 41 Barb. (N. Y.) 353.

[123] Locke v. North America Ins. Co., 13 Mass. 61. In this case A, who had borrowed money of B for the purchase of a cargo, assigning the same to B, and taking a bill of lading, and making invoice in B's name under agreement that B was first to receive his debt from the sale of the cargo, and surplus to belong to him, and, if not sufficient to discharge his obligation to B, was to be holden accountable for the balance, was held to have an insurable interest in the cargo and entitled to recover, although the nature of his interest was not made known to the underwriters at the time of insurance: Livermore v. Newburyport Ins. Co., 3 Mass. 264; Higginson v. Dall, 13 Mass. 101; Holbrook v. Brown, 2 Mass. 280; Hill v. Secretan, 3 Mass. 315; Bixby v. Franklin Ins. Co., 8 Pick. (Mass.) 86, where Parker, C. J., said: "The fact of the apparent ownership by A from the documents in the customhouse and the new register under the names X Y, after the transfer to the company, do not

In the federal courts, however, the rule as stated in the decisions is that an equitable interest must, in order to be protected, be disclosed as such, for the reason that an insurance on the ship may be reasonably assumed by the underwriter to refer to the legal title.[124]

§ **1823. Facts not within Assured's Knowledge—Degree of Diligence Required of Assured.**—There is no concealment if the information is not within the insured's knowledge, nor a fact which he is presumed to know or ought to know, nor one within his means of knowledge;[125] nor is it obligatory upon the assured to use all accessible means of information up to the very last moment of time where he acts in entire good faith,[126] although he should exercise all reasonable and due diligence in communicating those facts of which he has knowledge; as where he receives intelligence after the order is given to insurer, and he might have communicated the same, a failure to do so is fatal.[127]

§ **1824. Need not Disclose Matters of Express or Implied Warranty.**—The state or condition, quality, or circumstances of the ship previously to effecting the policy, such as her age, repairs, where she was built, and other matters relating to her seaworthiness, as that term is generally used, need

affect the question of property, unless the sale should be contested by a creditor of X. Such a document as a bill of sale or other instrument may be required in the admiralty courts, but we are not aware that the principle has been introduced into our common law."

[124] Ohle v. Eagle Ins. Co., 4 Mason (C. C.), 397, 172, per Story, J.; Russell v. Union Ins. Co., 4 Dall. (U. S.) 421. See secs. 1716, 1859, herein.

[125] Foley v. Tabor, 2 Fost. & F. 663; Greenwell v. Nicholson, 1 Jur. 285; Mayne v. Walter, reported in 1 Marshall on Insurance, ed. 1810, 479; Doug. 79.

[126] Neptune Ins. Co. v. Robinson, 11 Gill & J. (Md.) 256. But see Andrews v. Marine Ins. Co., 9 Johns. (N. Y.) 32.

[127] Watson v. Delafield, 2 Caines (N. Y.) 224; 1 Johns. (N. Y.) 152; 2 Johns. (N. Y.) 526; M'Lanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, per Story, J. "If there is no fraud, and one of the parties is not better informed than the other, the least uncertainty of the event, fortunate or unfortunate, suffices to render the insurance valid": Emerigon on Insurance, Meredith's ed. 1850, c. xv, sec. 3, p. 635.

not be stated. It is not necessary to communicate or disclose matters concerning which the insured undertakes for by warranty, express or implied, provided, however, such matters are not otherwise material.[128] Thus, where no inquiry is made, the assured need not disclose matters affecting the seaworthiness of the vessel,[129] and a statement upon information that the vessel had carried a cargo of coal on a previous voyage adds nothing to the warranty of seaworthiness for the voyage insured;[130] nor need assured disclose facts, such as carelessness or want of economy in the master, which do not impeach his honesty,[131] nor that she had been set down as unseaworthy in marine reports at the place of insurance.[132] But the rule herein given may not govern under a time policy in England,[133] where there is no implied warranty of seaworthiness in time policies.[134]

§ 1825. Whether Information which Falsifies a Warranty Must be Disclosed.—Mr. Duer advances the proposition

[128] Walden v. New York F. Ins. Co., 12 Johns. (N. Y.) 128, 513; Houston v. New England Ins. Co., 5 Pick. (Mass.) 89; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Shoolbred v. Nutt, reported in 1 Marshall on Insurance, ed. 1810, *475, per Lord Mansfield; Ruggles v. General Int. Ins. Co., 4 Mason (C. C.), 74; Popleston v. Ketchem, 3 Wash. (C. C.) 138; Long v. Duff, 2 Bos. & P. 209; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; De Wolf v. New York F. Ins. Co., 20 Johns. (N. Y.) 214; affirmed 2 Cow. (N. Y.) 56; Haywood v. Rodgers, 4 East, 590, per Lord Ellenborough. See Livingston v. Marine Ins. Co., 6 Cranch (U. S.), 274; 7 Cranch (U. S.), 506. Neither party is obligated to communicate matters "which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material": Deering's Annot. Civ. Code Cal., sec. 2564. "The right to information of material facts may be waived . . . . by the terms of insurance": Deering's Annot. Civ. Code Cal., sec. 2567.

[129] Walden v. New York Fireman's Ins. Co., 12 Johns. (N. Y.) 513; affirming 12 Johns. (N. Y.) 128; Silloway v. Neptune Ins. Co., 12 Gray (Mass.), 73; Augusta etc. Ins. Co. v. Abbott, 12 Md. 348.

[130] Augusta etc. Ins. Co. v. Abbott, 12 Md. 348.

[131] Walden v. New York Fireman's Ins. Co., 12 Johns. (N. Y.) 128; affirmed 12 Johns. (N. Y.) 513.

[132] Augusta Ins. Co. v. Abbott, 12 Md. 348.

[133] Russell v. Thornton, 4 Hurl. & N. 788; 29 L. J. Ex. 9; 30 L. J. Ex. 69.

[134] Dudgeon v. Pembroke, L. R. 9 Q. B. 581; 1 Q. B. D. 96; 2 App. Cas. 284; Thompson v. Hopper, 6 El. & B. 188; 25 L. J. Q. B. 249;

that the insured must not conceal facts or information which he knows falsifies a warranty. He exhaustively considers the point and concludes that the assured's "concealment of the facts or information that falsify the warranty is in all cases to be deemed a fraud that vitiates the policy. It is the fair and reasonable construction of every warranty that it is an allegation on the part of the assured of the truth of the facts that it embraces, and such an allegation he can never be justified in making when he knows or believes it to be untrue, since its necessary tendency in all cases is to deceive the insurer by leading him to assume a risk that with a knowledge of the truth he would certainly have declined. It is on the truth of the warranty, not merely on the fact that it is given, that the underwriter relies. Had he believed it to be false, he would not, by consenting to the insurance, have incurred the hazard of being made the victim of a fraud that he would have known was designed." [135] So much importance has been attached to the proposition thus advanced by Mr. Duer that a rule based thereon has been incorporated into the code of California,[136] and it is decided in New York in the matter of a representation as to the age and rating of a ship that if the representation as to the rating was material and untrue, it would avoid the policy,[137] but this was a case of allegatio falsi, rather than of suppressio veri, and, while it might have some bearing upon the matter, could easilly be decided without reference to Mr. Duer's rule. If, however, a case should arise within that rule, there seems no valid reason why outside of any code provision such a case should not be governed by the rule.

West India Telegraph Co. v. Home etc. Ins. Co., 6 Q. B. D. 51, per the court.

[135] 2 Duer on Insurance, ed. 1846, 435 (quotation at p. 437), et seq., 573, et seq., considering and relying upon Woolmer v. Muilman, 3 Burr. 1419; 1 Wm. Black. 429; 1 Park on Insurance, 406; Hyde v. Bruce, reported in 1 Marshall on Insurance, ed. 1810, 347 a; and Stewart v. Morrison, reported in Millar on Insurance, 59.

[136] The California Civil Code reads: "An intentional and fraudulent omission on the part of one insured to communicate the information of matters proving or intending to prove the falsity of a warranty entitles the insurer to rescind": Sec. 2569.

[137] Bulkley v. Protection Ins. Co., 2 Paine (C. C.), 82.

§ 1826. Mode of Construction of Vessels.—That boats of a certain class are constructed in a way usual to that class need not be disclosed, for it is presumed to be known to the underwriter.[138]

§ 1827. Destination of Vessel—Port or Ports.—If the underwriter insures private ships of war from and to ports and places, it is not necessary to disclose the secret enterprises upon which they are destined, since he waives the information, knowing the nature of the contract, and therefore must know some expedition is intended;[139] nor need the particular destination of a vessel be disclosed under an insurance to several ports or to a specified port and a market.[140] An ulterior destination beyond a neutral port need not be stated where the voyage is to the neutral port from a belligerent country.[141]

§ 1828. By-gone Calamities—Previous Condition of Ship—Latest Intelligence.—By-gone calamities need not be disclosed. If the assured in good faith truly states all his latest information or intelligence concerning the state or condition of the ship, it is sufficient.[142] It would seem, however, that if the character of such previously occurring events was such that it might be fairly inferred that the danger was continuing they would be material and ought to be disclosed, and certainly if they prove in fact to have been material and are not disclosed, the policy would be avoided.[143]

§ 1829. That Goods are to be Stowed on Deck Need not be Disclosed.—That goods are stowed or intended to

[138] Lexington Ins. Co. v. Pauer, 16 Ohio, 324.

[139] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593; per Lord Mansfield.

[140] Houston v. New England Ins. Co., 5 Pick. (Mass.) 89.

[141] Steinbach v. Columbian Ins. Co., 2 Caines (N. Y.), 129. Neither party need disclose matters "of which the other waives communication": Deering's Cal. Civ. Code, sec. 2564.

[142] Freeland v. Glover, 6 Esp. 14; 7 East, 457, per Lord Ellenborough; Kemble v. Bonne, 1 Caines (N. Y.), 75.

[143] See Ingraham v. South Carolina Ins. Co., 3 Brev. (S. C.) 522; 2 Duer on Marine Insurance, ed. 1845, 443, et seq.; 2 Parsons on Marine Insurance, ed. 1868, 489, et seq.

be stowed on deck need not be stated, nor that the ship is to and does carry a deckload.[144]

§ **1830. Particular Language of Bill of Lading.**—The particular language of bills of lading need not be disclosed to underwriters on the cargo. It is sufficient that they are so general as to comprehend the part concerning which the insurance is effected.[145]

§ **1831. Excepted Risks.**—Facts or information which relate or are material to a risk expressly or impliedly excepted from the policy need not be disclosed, provided the existence of such risk does not in itself change or increase, or tend to change or increase, the risks which the underwriter actually undertakes.[146]

§ **1832. Ship's Papers—False Clearance, etc.**—If a letter submitted to the underwriters ordering insurance refers to another letter previously laid before them, which letter contains information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal,[147] nor need a false clearance under a general policy on war risks be disclosed.[148] The use of false papers, when rendered necessary by the nature of the trade insured and by its known course and usage,

[144] Clarkson v. Young, 22 L. T., N. S., 41; De Costa v. Edmonds, 4 Camp. 142, 2 Chit. 227.

[145] Hurtin v. Phoenix Ins. Co., 1 Wash. (C. C.) 400. It is held that it must be shown that the goods specified in the bill of lading were actually loaded on board the vessel: M'Andrew v. Bell, 1 Esp. 373. And also if the bill of lading was for the outward cargo, the proceeds must be shown to have been shipped for the homeward voyage, for such outward bill is not evidence of an interest in the homeward goods: Beale v. Pettit, 1 Wash. (C. C.) 241.

[146] Neither party is obligated to disclose information or matters "which relate to a risk excepted from the policy, and which are not otherwise material": Deering's Annot. Civ. Code Cal., sec. 2564; 2 Duer on Marine Insurance, ed. 1846, 577, et seq.

[147] Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506.

[148] Barnewell v. Church, 1 Caines (N. Y.), 217; Planche v. Fletcher, Doug. 283, per Lord Mansfield.

need not be disclosed.[149] So if the vessel have on board a document usual and customary in the course of the trade in which she is engaged, although it may expose her to capture and condemnation, it need not be disclosed.[150] But the rule is otherwise where their use is not so warranted by necessity or usage, and there is no consent by the insurer thereto.[151] So the want of necessary papers to show the ship's national character should be disclosed where a policy is effected upon the ship or freight, or the owner's or charterer's goods; otherwise in case of goods of one who has no interest therein.[152] There would exist, however, an exception where an arbitrary ordinance of a belligerent enjoins the use of such a paper, and the policy is effected by a neutral.[153]

§ 1833. Whether the Fact that Letters of Marque are on Board need be Disclosed.—It has been held that the fact that letters of marque are on board must be disclosed,[154] but the better opinion seems to be that such fact alone can have no effect upon the policy, and need not be stated.[155]

[149] Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506, per Marshall, C. J.; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151, per Johnson, J.; Calbreath v. Gray, 1 Wash. (C. C.) 192.

[150] Le Roy v. United Ins. Co., 7 Johns. (N. Y.) 343.

[151] Horneyer v. Lushington, 15 East, 46; Phœnix Ins. Co. v. Pratt, 2 Burr, 308; Bell v. Brownfield, 15 East, 364; Steele v. Lacy, 3 Taunt. 284; Schwartz v. Insurance Co. of North America, 3 Wash. (C. C.) 117. If the neutral has shipped as his own goods belonging to subjects of one of the belligerents, and the real agency has not been declared to the insurers, they are not responsible for capture, and confiscation. They would be responsible if the true agency, concealed under simulated papers, had been declared to them": Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 5, p. 170.

[152] Cleveland v. Marine Ins. Co., 8 Mass. 308; Bell v. Carstairs, 14 East, 394, per Lord Ellenborough; Polleys v. Ocean Ins. Co., 2 Shep. (Me.) 141, where it was decided that where the national character of a vessel is not made a part of the contract of insurance, the want of proper documents to show such character is not material, unless it appear that loss happened or risk was increased in consequence of the absence of such documents.

[153] Pollard v. Bell, 8 Term Rep. 434.

[154] Dennison v. Modigliani, 5 Term Rep. 580, per Lord Kenyon.

[155] Higgin v. Boardman, 14 Mass. 24, per Parker, C. J.; Jarratt v. Walker, 1 Camp. 263, 266, per Lord Ellenborough; Moss v. Byran, 6 Term Rep. 379.

§ **1834. Ship's True Port of Loading.**—The insured should disclose the true port of loading to the underwriter where such port is unknown as a place of loading, and not one which by the usages of trade they are bound to know, especially where the knowledge by the underwriters would have caused them to charge a higher premium. Thus, where it is uncertain from the terms of the policy or application whether the ship will proceed to one of several ports, and the insured has positive information that the master will proceed to a certain port and load her there, a failure to communicate such fact will be a material concealment avoiding the policy.[156]

[156] Harrower v. Hutchinson, 5 L. R. Q. B. 584; 22 Law Rep. 684; 39 L. J. Q. B. 229; reversing 4 L. R. Q. B. 523 (three judges dissenting). The facts of the case were these: The plaintiffs effected a policy on bone and bone-ash on board a certain vessel at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. It was known to the plaintiffs at the time that the vessel was going from Buenos Ayres to Laguna de los Padres, a port in the province, to complete her cargo, but at that time the defendant did not know that L. was a port in the province. Vessels could not clear therefrom, but had to return to Buenos Ayres to obtain clearance. There was no artificial port at L., but only a roadstead protected by natural headlands, and forming a kind of bay. The vessel went to L., but was unable to obtain cargo there, and on her return to Buenos Ayres was lost. Had the underwriters known of said fact, they would have charged a higher premium. The fact of her going to L. was held a material one, the nondisclosure of which avoided the policy. The court, per Kelly, C. B., says: "Within the general rule, therefore, laid down in many cases, it was a fact which the assured was bound to disclose, unless it can be correctly affirmed that it was a fact which the assured had a right to assume was within the knowledge of the underwriter, or concerning which the underwriter had waived further information, or which the underwriter was bound to know. The facts and correspondence set out in the case show that the plaintiffs and their agents knew that Laguna de los Padres was unknown to underwriters in general as a port of loading, and even, as we think, that it was unknown to the defendant. It is impossible, therefore, as it seems to us, to maintain that the plaintiffs were authorized to assume that the defendant knew of the port as a port of loading. The case in which an underwriter is said to waive being informed of a fact is where a representation made to him should suggest a doubt or inquiry to the mind, and he omits to make the inquiry: Phillips on Insurance, sec. 568. In the present case there was no such representation, and therefore the doctrine cannot apply. It might have

§ 1835. Other Matters not Necessary to be Disclosed. The insured need not disclose how long a ship has been in port prior to the time of effecting the insurance,[157] nor what lessens the risk agreed to be run; as upon a policy for three years that it will be over in two, nor under a policy with liberty of deviation, what shows or tends to show that there will be no devia-

applied if the name of Laguna de los Padres had been mentioned, and the defendant had made no inquiry about it. The real question in this case, therefore, is, What are the facts which an underwriter ought to know? In Carter v. Boehm, 3 Burr. 1910, Lord Mansfield thus states the proposition: 'The assured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of.' He then gives several instances of facts which the underwriter ought to know, and then he continues: 'The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which are privately known, and the other is ignorant of and has no reason to suspect' . . . . In Phillips on Insurance, sec. 531, the material fact which may not be concealed is thus described: 'And which is known or presumed to be so to the party not disclosing it, and is not known or presumed to be so to the other.' In section 571, speaking of the knowledge of the trade which is to be assumed, he says: 'The assured is not required to communicate to the underwriter facts which are presumed or proved to be known to those conversant with the trade,' etc. In section 593: 'The underwriter is presumed to know the usages of the particular trade insured, and these, accordingly, need not be represented to the underwriter.' Now, usages of trade can only exist in a known and established trade, and all the analogies seem to show that the usages of trade mentioned in section 593 are confined to a known and established trade. . . . . The underwriter was not bound to know that which no other underwriter, i. e., no other person engaged in the same trade or business as himself, knew. He was not bound to know that Laguna de los Padres was a loading port in the province of Buenos Ayres, or that it was subject to local dangers. . . . . We are of opinion, therefore, that the assured in this case concealed from the underwriter a material fact which was known to the assured and was not known to the underwriter, and that the fact so concealed was not one which the assured was entitled to presume was known to the underwriter, nor one as to which the underwriter had waived further information, nor one which the underwriter ought to have known, and consequently it was the duty of the assured to communicate the fact to the underwriter, and the noncommunication vitiated the policy": Id. 590-92. This case is cited in Tate v. Hyslop, L. R. 15 Q. B. D. 376. See, also, Hodgson v. Richardson, 1 Wm. Black. 463.

[157] Kemble v. Bonne, 1 Caines (N. Y.), 75.

tion need not be told.[158] So the underwriter is presumed to be acquainted with the general course and incidents of trade, with the general risks affecting commerce with particular countries, with the established import of terms used in their contracts, and such facts need not be disclosed.[159] That other insurers have insured the risk need not be disclosed, nor their conclusions, fears, or apprehensions concerning the same;[160] nor need it be disclosed that the insured is a subject of a belligerent state and has immigrated to this country flagrante bello and become naturalized.[161] Where a ship has been chartered for a lump sum, and the charterers have insured their "profit on charter," they are not bound to voluntarily disclose to the insurers the fact that the charter freight is a lump sum and not a tonnage rate, for where insurers purport to insure the profit on charter, they are put upon inquiry to ascertain the terms of the charter.[162]

§ 1836. Other Matters Necessary to be Disclosed.—If the order to insure states that upon the arrival of the ship the owner will send notice thereof to the broker by express, such fact should be disclosed, unless circumstances exist, such as the high rate of premium or relative dates, from which the fact might reasonably be inferred that the insurer knew of

[158] Carter v. Boehm, 3 Burr. 1909; 1 Wm. Black. 593, per Lord Mansfield.

[159] Buch v. Chesapeake Ins. Co., 1 Pet. (U. S.) 160, per Johnson, J.; Norris v. Insurance Co. of North America, 3 Yeates (Pa.), 84; De Longuemere v. New York Ins. Co., 10 Johns. (N. Y.) 120; Kohne v. Insurance Co., 1 Wash. (C. C.) 154, per Washington, J.; Pinn v. Lewis, 2 Fost. & F. 778; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402.

[160] Ruggles v. General Int. Ins. Co., 4 Mason (C. C.), 74; Clason v. Smith, 3 Wash. (C. C.) 156. But see Johnson v. Phoenix Ins. Co., 1 Wash. (C. C.) 378; Hoyt v. Gilman, 8 Mass. 336; Moses v. Delaware Ins. Co., 1 Wash. (C. C.) 378. And see Harrower v. Hutchinson, 5 L. R. Q. B. 584; 39 L. J. Q. B. 229, where the fact that other insurers had refused to take the risk at the premium paid was considered, together with another point against the insured.

[161] Duguet v. Rhinelander, 2 Johns. C. (N. Y.) 476; 1 Caines Cas. (N. Y.) 25.

[162] Asfar v. Blundell (1895), 2 L. R. Q. B. D. 196.

the ship's nonarrival.[163] It is held that where a policy is altered to correct a mistake so as to change the subject matter, the insured should communicate material facts learned after the policy was effected and known at the time the alteration was made.[164] An excessive valuation, even though there be no fraud, may be material and necessary to be disclosed.[165] If in time of war the insured knows that the vessel will not sail with convoy, and permits the underwriter to insure under the belief that she will or may sail with convoy, this is a material concealment.[166] If an order to insure is received, directing the correspondent to wait a specified time to give the ship time to arrive before effecting the insurance, neglect to communicate the time of receiving such order and the delay before insuring is fatal to a recovery.[167] Where a fact is material and ought to be disclosed, it is held that the knowledge of a director of a company is not the company's knowledge.[168] But where the president of the insuring company had actual knowledge learned from newspapers at the office, the company was held to have knowledge.[169] The moral character of the master need not be disclosed according to Mr. Phillips, while Mr.

[163] Court v. Martineau, 3 Doug. 161. The court found that under the facts of this case there was no concealment.

[164] Sawtell v. London, 5 Taunt. 359. See Weir v. Aberdeen, 2 Barn. & Ald. 320; French v. Patton, 9 East, 331.

[165] Ionides v. Pender, L. R. 9 Q. B. 531. In this case a paper was shown the underwriter containing certain words in German, and which, had the underwriter understood them, would have at least caused an inquiry. Quaere, ought not the underwriter to have been held put on inquiry, and by neglect to ascertain the interpretation of the words, have been precluded from alleging a material concealment? How does it differ in principle from the case where a letter is shown the insurer which refers to another letter, and the letter contains the facts alleged to have been concealed, in which case there is no concealment of matters contained in the letter referred to: Freeland v. Glover, 7 East, 457; 6 Esp. 14. See sec. 1798, herein.

[166] Reid v. Hawey, 4 Dow, 97. See Sawtelle v. London, 5 Taunt. 358.

[167] Richards v. Murdock, 10 Barn. & C. 527.

[168] Himely v. South Carolina Ins. Co., 3 Const. Rep. 154; 1 Mills' Const. (S. C.) 153.

[169] Green v. Merchants' Ins. Co., 10 Pick (Mass.) 402.

Duer thinks otherwise.[170] Instructions violating rules of admiralty courts of England must be disclosed, although such rules are opposed to the law of nations.[171]

§ **1837. Where Inquiries are Made.**—In case of inquiry by the insurers, the failure to disclose or truly state the fact inquired about will be fatal to the contract, even though not material; for by making the inquiry it is a reasonable presumption that the insurer considers such facts material.[172]

[170] 1 Phillips on Insurance, 3d ed., 331; 2 Duer on Marine Insurance, ed. 1846, 441, et seq. See Walden v. Fireman's Ins. Co.. 12 Johns. (N. Y.) 128, 513, cited by both.

[171] Kohne v. Insurance Co. of North America, 1 Wash. (C. C.) 93; 6 Binn. (Pa.) 219.

[172] Himely v. South Carolina Ins. Co., 1 Mills' Const. (S. C.) 153; Dennison v. Thomaston Mut. F. Ins. Co., 20 Me. 125. As to what facts are waived by failure to inquire, see Deering's Annot. Civ. Code Ca., sec. 2567, sec. 1798, herein.

CHAPTER XLIII.

CONCEALMENT IN OTHER THAN MARINE RISKS.

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§ 1844. Concealment in Other Than Marine Risks—Generally.—As stated under the last chapter, the rule in this country in regard to concealment is not so strict in other risks as in cases of marine insurances, except possibly to some degree in fire risks, and there is some reason for this relaxation of the rule required in marine risks, since many cases will undoubtedly arise, especially in life risks, where the information cannot be certain and specific.[1] In England, however, the rule seems to be equally strict in all risks,[2] except in cases of guarantee insurance, where the nature of the insurance warrants a relaxation of the rule. Concealment exists where the assured has knowledge of a fact material to the risk, and honesty, good faith, and fair dealing requires that he should communicate it to the assured, but he designedly and intentionally withholds the same.[3] Another rule is that if the assured undertakes to state all the circumstances affecting the risk, a full and fair statement of all is required.[4] It is held that the concealment must, in the absence of inquiries, be not only material, but fraudulent, or the fact must have been intentionally withheld.[5] But it would seem that if a material fact is actually known to the assured, its concealment must of itself nec-

[1] Hartford etc Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Horn v. American Mut. L. Ins. Co., 64 Barb. (N. Y.) 81. See sec. 1249, herein.

[2] London Assur. Co. v. Mansel, L. R. 8 Ch. D. 363; 11 Ch. D. 363. See criticism by Mr. Justice Gray in Phoenix L. Ins. Co. v. Raddin, 120 U. S. 183, of the remarks of Sir George Jessel, M. R., who delivered the judgment in the above case, which criticism shows that the strict rule of the English cases does not obtain here, at least so far as the rule there impliedly stated goes. See sec. 206, herein.

[3] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721.

[4] Stoney v. Union Ins. Co., 3 McCord (S. C.). 387; 15 Am. Dec. 634.

[5] Alkan v. N. H. Ins. Co., 53 Wis. 136, and cases cited in last two notes.

essarily be a fraud, and if the fact is one which the assured ought to know, or is presumed to know, the presumption of knowledge ought to place the assured in the same position as in the former case with relation to material facts; and if the jury in such cases find the fact material, and one tending to increase the risk, it is difficult to see how the inference of a fraudulent intent or intentional concealment can be avoided.[6] This does not, however, include those cases where by warranty the question of materiality is excluded from the jury, nor questions where inquiries are specially made.[7] These rules must, however, be qualified by many exceptions, as in cases where the insurer has actual knowledge of the facts, or where he is presumed to know or ought to know them, or where he waives information concerning the same either by himself or his authorized agent, which several exceptions or qualifications, as well as others, will be hereafter specifically noted. Concealment which is not fraudulent will avoid a fire policy if the conditions annexed to the policy and the form of application require the concealed fact to be stated, and if one of the conditions expressly provides that "any misrepresentation or concealment" will vitiate the policy.[8] A concealment or breach of warranty which will avoid a policy of fire insurance is not shown by proof that facts material to the risk, which were known to the insured when he applied for the policy, were not disclosed by him.[9] Another important factor to be considered in connection with the question of concealment is that a fact immaterial in itself may be made material by the

[6] See People v. Liverpool etc. Ins. Co., 2 N. Y. S. C. 268; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; 10 Pet. (U. S.) 507; Hoyt v. Gilman, 8 Mass. 336; Sussex Co. Ins. Co. v. Woodruff, 26 N. J. 541; Walden v. Louisiana Ins. Co., 12 La. 134; New York Bowery Ins. Co. v. New York F. Ins. Co., 17 Wend. (N. Y.) 359. See sec. 1847, herein.

[7] Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Mutual B. L. Ins. Co. v. Cannon, 48 Ind. 264; Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Bube v. Hartford Mut. Ins. Co., 25 Conn. 51; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Fame Ins. Co. v. Thomas, 10 Ill. App. 545.

[8] Burritt v. Saratoga Co. etc. Ins. Co., 5 Hill (N. Y.) 188; 40 Am. Dec. 345.

[9] Gates v. Madison Co. etc. Ins. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360.

requirement of the policy, and a material fact may become immaterial by the terms of the contract. The contract, therefore, is matter of consideration, especially when inquiries are made concerning such matters. This is illustrated in part by the case where the question of other insurance and whether the same has been applied for and refused are made material, and a basis of the contract and inquiries are made concerning the same.[10] Again, the insurer may limit his right to information to special facts, or the limitation may extend to the materiality of facts.[11] In determining what constitutes a concealment, considered separately and strictly as such, the question is far from being free of difficulties. The matter is so closely interwoven with that of warranties and representations dependent upon the terms of the policy, and it is to those cases that we must look almost exclusively for decisions involving the point. Necessarily, if specific inquiries are made, the matter is greatly simplified, but even then assume the case of a life risk wherein the assured, without actual knowledge of a fact, answers a question in accordance with his honest belief, without any design or fraudulent intent to withhold a material fact, then the question has not unfrequently arisen whether the fact is not one which he ought to have known and is presumed to know, and consequently has concealed.[12]

[10] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183, per Gray, J.; citing Shawmut Mut. F. Ins. Co. v. Stevens, 9 Allen (Mass.), 332; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495; Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Hardy v. Union Mut. F. Ins. Co., 4 Allen (Mass.), 417; Edington v. Aetna L. Ins. Co., 77 N. Y. 564; 100 N. Y. 536.

[11] Jones v. Provincial Ins. Co., 3 Com. B. N. S., 65; 25 L. J. Com. P. 272.

[12] See notes under last chapter giving code provision in California relating to concealment. For statutes as to concealment and misrepresentation, see Cal., Deering's Annot. Civ. Code, secs. 2561-82; Can., Sharp's Civ. Code, 1888, sec. 2570; Dak., Comp. L., secs. 4119-40; Ga., Code 1882, secs. 2803, 2804, 2806; Ky., Gen. Stats. 1888, p. 303, sec. 22; Me., Rev. Stats. 1883, 446, 459, c. 49, secs. 20, 85; Mass., Pub. Stats. 1882, c. 119, sec. 181; Acts 1887, c. 214; Acts 1890, c. 284; N. H., Pub. Stats. 1891, p. 485, c. 170, sec. 2; Okla. Stats. 1890, secs. 3066-74; 3076-86.

§ **1845. English Decisions.**—Some of the English cases are important, in so far as they establish general principles, although as above stated the rule as to concealment in fire and life risks is more strictly enforced than in this country, and this fact should not be lost sight of in the considerations of these decisions. The leading case is that of Carter v. Boehm,[13] in which the celebrated judgment of Lord Mansfield was given. That opinion has been frequently quoted and relied on both in England and this country. The opinion of Lord Mansfield cannot well be abridged, and as the lack of space prevents its being given in the text, the principal points in the case and the opinion are given below.[14] Information or facts which are

[13] 3 Burr. 1905; 1 Wm. Black. 593.

[14] The case was this: An insurance was effected for the term of one year in the amount of £10,000 by an underwriter in London, against the capture of a fort in the island of Sumatra, for the benefit of the governor, who had £20,000 effects in the fort. The fort was captured within the term of insurance. The questions involved in the case were: 1. That the governor did not state the condition of the place. It was declared that no obligation rested upon him to do this, so far as it might be inconsistent with his duty to the state. As a matter of fact, however, he wrote the company everything which he knew or suspected, and no questions were asked by the underwriters, by which they were held to have taken upon themselves a full knowledge of its state and condition, and the court also said it was sufficient that the fort was in the condition which it ought to be for the purposes intended, and that it was insured against a contingency in the contemplation of the parties. 2. That there was no disclosure that the French might attack the fort. This was declared to be a "mere speculation, dictated by fear, and not a fact in the case. . . . . The practicability of it depended upon the English naval force in those seas, of which the underwriter could better judge at London . . . . than the governor" at the fort. 3. That the governor concealed the design of the French to attack the fort the year before. "That design rested merely on report . . . . the report of a design of the year before, but then dropped." and hence immaterial. 4. That there was no disclosure that the governor was apprehensive of a Dutch war. This "must have arisen from a political speculation and general intelligence," and need not, therefore, have been disclosed. And the conclusion is, that as to those matters it was the duty of the underwriter to inquire at the time, and that "if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now after the event." Mr. Marshall criticises this case as that of an insurance against the policy of the law, and that it is without an example: 1 Marshall on Insurance, ed. 1810, *479-84 a. But although he criticises the case be-

of public knowledge, or so notorious that the presumption may reasonably exist that the insurer has knowledge thereof, need

cause of the particular facts involved, he does not criticise the opinion and the general principles stated, and in fact such a criticism would be neither warranted nor sustained. Although we have generally referred in the last chapter to this celebrated opinion, we give it here. Lord Mansfield says: "It may be proper to say something in general of concealments which avoid a policy. Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void, because the risk run is really different from the risk understood and agreed to be run at the time of agreement. The policy would be equally void against the underwriter if he concealed anything, as if he insured the ship on the voyage which he privately knew to be arrived, and an action would lie to recover the premium. The governing principle is applicable to all contracts and fair dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon. Aliud est cilare aliud tacere; neque enim id est cilare quicquid reticeas; sed cum quod tu scias, id ignorare, emolumenti tui causa, velis eos, quorum intersit id scire. This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favor of the party misled by his ignorance of the thing concealed. There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows, scientia utrinque par, pares contrabentes facit. An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, what he waives being informed of. The underwriter needs not to be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation, as, for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils, from the ruptures of states, from war, and the various operations of it. He is bound to know the probability of safety from the continuance or return of peace, from the imbecility of the enemy, through the weakness of

not be disclosed in the absence of specific inquiry.[15] If the assured refers to a medical attendant or one who has attended him professionally, he is none the less obligated to make a full disclosure of all the material facts necessary to be made known to the insurer.[16] Again, it is held that if no inquiries are made and no fraud or design to conceal enters into the concealment, it will not avoid the insurance.[17] It has also been declared that it is immaterial whether the death was caused by the fact withheld or concealed or not; the sole test being its materiality at the time.[18] Although it is also declared that the insured is not obligated to volunteer statements of every circumstance

their councils or their want of strength, etc. If an underwriter insures private ships of war by sea and on shore, from port to ports and place to places anywhere, he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view, and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it to be over in two; or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation. Men argue differently from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both; each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other. The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which one privately knows and the other is ignorant of and has no reason to suspect. The question, therefore, must always be, 'whether there was, under all the circumstances at the time the policy was underwritten, a fair representation or a concealment, fraudulent if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run'."

[15] Bronson v. Ottawa Agr. Ins. Co., 42 U. C. Q. B. 282, and see last chapter.

[16] Forbes v. Edinburg L. Assur. Co., 10 S. & D. 451; 4 Scot. Jur. 385; Abbott v. Howard, Hayes, 381. To what extent the insured is bound by the representations or concealment of the party referred to, see, also, Maynard v. Rhodes, 1 Car & P. 360; 5 Dowl. & R. 266; Rawlins v. Desbrough, 2 Moody & R. 328; Wheelton v. Hardesty, 3 Jur., N. S., 1169, 8 El. & B. 232; Henckman v. Ferrie, 3 Mees. & W. 505; 7 L. J. Ex., 163.

[17] Laidlaw v. Liverpool etc. Ins. Co., 13 Grant Ch. (U. C.) 377.

[18] Maynard v. Rhodes, 1 Cor. & P. 360; 5 Dowl. & R. 266, per Abbott, C. J. See Ross v. Bradshaw, 1 W. Black. 312.

which anybody may subsequently deem important as affecting the risk upon his life, but that it is requisite only that he answer all questions truly, make no untrue statements, and submit himself to a full examination.[19] If a fact produces a fear in the mind of the assured which operates as the moving cause for effecting a policy, the fact which occasioned the fear thereby becomes material, and should be disclosed.[20] So the information may be sufficient although it does not disclose minutely every specific detail with relation to the assured's health.[21] Contracts of insurance require on both sides uberrima fides, and the insured may fail in the duty of disclosure even though he acts in good faith. He must diligently and carefully review all facts of which he has knowledge which bear upon the risks asked of the insured to be assumed, and state every fact and circumstance and all information which any reasonable man would suppose might in any way influence the insurer in determining whether he will undertake the risk. The insured is not excused by any negligence or want of fair consideration of the insurer's interest with reference to material facts, even though there be no dishonesty, and although the assured may not have believed at the time that the fact known by him to exist was material, provided it subsequently transpires to be material.[22] The rule, however, as to disclosure must be one which is not unreasonable in its requirements, for there must be some limitation, especially in cases of disorders which may tend to shorten life. If all disorders which may have such a tendency were required to be disclosed, whether organic or not, it would be difficult to conceive many cases wherein the life would be insurable.[23] It is held that although the insured knows of a material fact and conceals the same at the time of

[19] Rawlings v. Desbrough, 2 Moody & R. 230.

[20] Campbell v. Victoria Mut. F. Ins. Co., 45 U. C. Q. B. 412 (one judge dissenting); 17 Can. L. J. 48.

[21] Chattock v. Shawe, 1 Moody & R. 498; Watson v. Mainwaring, 4 Taunt. 763.

[22] Life Assn. of Scotland v. Foster, 11 Ct. of Sess. Cas., 3d ser. 351; 4 Big. L. & A. Ins. Cas. 520; Dalgleish v. Jarvie, 2 Macn. & G. 243, per Rolfe, B.

[23] Watson v. Mainwaring, 4 Taunt. 763, per the court; Jones v. Provincial Ins. Co., 3 Com. B., N. S., 65; 26 L. J. Com. P. 272.

the proposal, yet if before issuing the policy the insurer learns of the fact, the issuance of the policy waives the concealment.[24] It is said that the mere noncommunication of the insured's habits of life is not fatal when not inquired about,[25] but it is decided that if the insured, without being interrogated particularly about his habits, studiously conceals the same, it vitiates the insurance.[26] In cases of guarantee insurance the question of fraud is of the utmost importance, since if it enter as a factor into the concealment the contract will be vitiated.[27]

§ **1846. Assured's Knowledge.**—There are two important factors involved in cases of concealment; one is the assured's knowledge and the other the insurer's knowledge. In both cases the knowledge may be actual or rest upon a presumption based upon the fact that the circumstances are of such a character that they ought to be known and may reasonably be presumed to be known.[28] The assured could not reasonably be held to have concealed a fact of which he had no knowledge or one of which he has no knowledge actual or presumed, or one concerning which it cannot be said that he ought to have known it. Even the strict rule in marine insurance does not require this.[29] The basis of the rule vitiating the contract in cases of concealment is that it misleads or deceives the insurer into accepting the risk, or accepting it at the rate of premium agreed upon. The insurer, relying upon

[24] Royal Canadian Ins. Co. v. Smith, 5 Russ. & Geld. (N. Scot.) 322 (one judge dissenting).

[25] Von Lindineau v. Desbrough, 3 Car. & P. 353; 8 Barn. & C. 586, per Lord Denman.

[26] Rawlins v. Desbrough, 2 Moody & R. 328; 8 Car. & P. 321.

[27] Watson v. Allcock, 4 De Gex & J. 242.

[28] See sec. 1850, herein, as to assurer's knowledge.

[29] Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125, per Washington, J.; Terwilliger v. Supreme Council Royal Arcanum, 2 N. Y. St. Rep. 144; Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black. 593, per Lord Mansfield, noted under sec. 1845, herein, note. See, also, Sprott v. Ross, 16 Ct. Sess. Cas. 1145; 3 Big. L. & A. Ins. Cas. 421; Boggs v. American Ins. Co., 30 Mo. 63; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Gates v. Madison Co. etc. Ins. Co., 63 N. Y. 186; Mallory v. Travelers' Ins. Co., 47 N. Y. 52. Section 1823, herein.

the belief that the assured will disclose every material fact within his actual or presumed knowledge, is misled into a belief that the circumstance withheld does not exist, and he is thereby induced to estimate the risk upon a false basis that it does not exist. The principal question, therefore, must be, Was the assurer misled or deceived into entering into a contract obligation or in fixing the premium of insurance by a withholding of material information or facts within the assured's knowledge or presumed knowledge?[30] It therefore follows that the assurer in assuming a risk is entitled to know every material fact of which the assured has exclusive or peculiar knowledge,[31] as well as all material facts which directly tend to increase the hazard or risk which are known by the assured, or which ought to be or are presumed to be known by him.[32] And a concealment of such facts vitiates the policy.[33] "It does not seem to be necessary . . . . that the . . . . suppression of the truth should have been willful. If it were but an inadvertent omission, yet if it were material to the risk and such as the plaintiff should have known to be so, it would render the policy void.[34]

§ 1847. Assured's Knowledge—Concealment Arising from Negligence, Accident, or Mistake, etc.—Keeping in

[30] See Carter v. Boehm, 3 Burn. 1903; 1 Wm. Black. 593, per Lord Mansfield, noted at length under sec. 1845, herein, note; American Ins. Co. v. Mahone, 56 Miss. 192; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; Keith v. Globe Ins. Co., 52 Ill. 518; Clark v. Union M. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546.

[31] Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546.

[32] Keith v. Globe Ins. Co., 52 Ill. 518; Rosenheim v. American Ins. Co., 33 Mo. 230.

[33] Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Vale v. Phœnix Ins. Co., 1 Wash. (C. C.) 283; Howell v. Cincinnati Ins. Co., 7 Ohio, 277; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Haley v. Dorchester etc. Ins. Co., 12 Gray (Mass.), 545; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Swift v. Massachusetts Mut. L. Ins. Co., 63 N. Y. 186; Kernochan v. New York Bowery Ins. Co., 5 Duer (N. Y.), 1; affirmed, 17 N. Y. 428; Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183, per Gray, J.; Ingraham v. South Carolina Ins. Co., 2 Tread. Const. (S. C.) 707; Gerhauser v. North B. & M. Ins. Co., 7 Nev. 174.

[34] Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125, per Whitman, J.

view what is said under the preceding section, if the act of the assured in withholding material information or a material fact or circumstance is intentional or designed, then it will be an actual fraud necessarily avoiding the contract.[35] But the rule in the last section must be understood with the qualification that if the information is not fraudulently suppressed or inquired about, a fire policy is not necessarily avoided by a failure to disclose every material fact; differing herein, as already noted, from marine risks. Good faith and fair dealing requires that the assured shall not misrepresent or designedly conceal material facts, and that if inquiries are made, that he will fully and truthfully answer the same, and also that he will not conceal or withhold such information concerning unusual and extraordinary circumstances of peril affecting the property as the insurer could not with reasonable diligence discover or reasonably anticipate as the foundation of specific inquiries.[36] In stating this qualification we have not intended to ignore the question whether concealment can be held to extend beyond an intentional or designed withholding of a material fact, and cover facts which are undisclosed by mistake, negligence, or accident, or those which the assured has the present means of knowing. In such cases the question would reasonably seem to be limited by the rule concerning facts which the assured ought to or is presumed to know, and the point whether there is a fraud or a designed, intentional withholding may or may not exist. Thus the assured may have no actual knowledge that a material fact exists, and yet by his voluntary act fail to make presumed knowledge actual knowledge. He may intentionally fail to convert what he ought to know into actual knowledge, preferring to remain in ignorance of certain facts, which if known to him would necessarily have

[35] See Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Clark v. Union Mut. F. Ins. Co., 4 N. H. 333; 33 Am. Dec. 721; Hewell v. Cincinnati Ins. Co., 1 Wash. (C. C.) 283.

[36] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Leach v. Republic F. Ins. Co., 58 N. H. 245. "The omission of the plaintiff to state truly his title to the property insured was not willful and fraudulent, and did not avoid the policy," per Allen, J.; Alkan v. N. H. Ins. Co., 53 Wis. 136.

to be disclosed. In such case he ought not to be permitted to shelter himself behind the plea that he had no knowledge. The intentional or designed failure to learn what he ought to know would seem to be as much tainted with fraud as if he had actually known the fact and designedly concealed it. In cases of pure accident and mistake, however, the party may absolutely have no intent or design to withhold material facts, and actual fraud may not exist on his part; yet if the fact so withheld is material, and one which the assured is presumed to or ought to know, the insurer ought not to be bound by a contract which had he known of the existence of the fact concealed would have never been made, except perhaps at a higher premium.[37] Thus, it will be held that a policy will be vitiated by the suppression of material facts by the insured, though withheld unintentionally or by mistake or inadvertence, without actual fraud.[38] And it may be stated generally that if a material fact is concealed by the assured, whether willfully, intentionally, or through mistake, the policy is thereby avoided, except in those cases where the assured does not undertake to state the matter charged to be false as a matter of positive knowledge on his part; as where he states it as a

[37] See Life Assn. of Scotland v. Foster, 11 Ct. Sess. Cas., 3d ser., 351; 4 Big. L. & A. Ins. Cas. 520; Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; Lewis v. Phœnix Ins. Co., 39 Conn. 100. There the court said: "The law not only refuses to enforce such a contract, but will decline to aid a party in recovering money paid in pursuance of it from the party upon whom the fraud was attempted to be practiced": Beebe v. Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Miles v. Connecticut Mut. L. Ins. Co., 3 Gray (Mass.), 580; Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125. It is not necessary, to render a policy void, that there should be a willful misrepresentation of the truth. A mere inadvertent omission of facts material to the risk, and such as the party insured should have known to be so, will avoid it: Price v. Phœnix L. Ins. Co., 17 Minn. 497; Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381.

[38] Beebe v. Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Smith v. Columbia Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546; Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Life Assn. of Scotland v. Foster, 11 Ct. Sess. Cas., 3d ser. 351; 4 Big. L. & A. Ins. Cas. 520; Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125. But see Wright v. Hartford F. Ins. Co., 36 Wis. 522.

matter of opinion or belief, whereby the insurer is put upon inquiry.[39] It is error to instruct a jury that a concealment, to avoid a policy, must have been willful and intentional.[40] While the cases in fire and life risks are far from warranting the deduction of any clear and positive rule, yet we believe that the above principles may be fairly deduced from the decisions wherein this question or analogous ones have arisen. It will not exact from the assured more than a reasonably prudent person of intelligence, acting within the limits of good faith and fair dealing, could fulfill. But in applying the rule the suggestion already made should not be ignored; namely, that a fact immaterial in itself may be made material by the terms of the agreement, and one material may become immaterial by the requirements of the contract.[41] Again, a question of waiver on the part of the insurer may arise; as where there is an omission to state matters not called for, or a neglect to answer inquiries made.[42] And so other exceptions and qualifications exist which will be noted hereafter under this chapter.

§ **1848. Assured's Knowledge—His Belief as to Materiality of Facts.**—If the assured has exclusive knowledge of material facts, he should fully and fairly disclose the same, whether he believes them material or not.[43] But notwith-

[39] Weigle v. Cascade F. Ins. Co., 12 Wash. (C. C.) 449; 41 Pac. Rep. 53, per Dunbar, J.; citing 1 May on Insurance, 3d ed., sec. 181; 1 Wood on Insurance, pp. 555, 557, and secs, 229, 230; distinguishing Hall v. People's Mut. F. Ins. Co., 6 Gray (Mass.), 185; and considering Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222.

[40] Weigle v. Cascade F. & M. Ins. Co., 12 Wash. (C. C.) 449; 41 Pac. Rep. 53.

[41] See sec. 1844, herein.

[42] See sec. 1869, herein.

[43] Smith v. Columbian Ins. Co., 17 Pa. St. 253; 55 Am. Dec. 546. In this case Gibson, J., said: "The contract of insurance is eminently a contract of good faith. When the insurer relies on the representations of the insured, he is entitled to the benefit of every material fact within the exclusive knowledge of the applicant; not to his surmises, opinions, and fears, but to the specific facts, if material, on which they are founded, in order that he may judge for himself; and this, too, whether the insured believe those facts to be material or not, or whether they are undisclosed by accident or design." See,

standing this general rule it will not infrequently happen, especially in life risks, that the assured may have a knowledge actual or presumed of material facts, and yet entertain an honest belief that they are not material. Thus, a man may be presumed to know that certain diseases will shorten or have a tendency to shorten life, but he may entertain an honest opinion and belief that such disease has no such tendency or he may be entirely ignorant of the possible or probable results of the disease. Would it necessarily follow in such case that his failure to disclose would vitiate the policy, or will such honest belief so fully eliminate the question of design or fraud in withholding the fact as to render it not a material concealment? It has been held even in England that if there is no designed and intentional withholding and no fraud, the failure to disclose, resting entirely upon the honest belief that the fact is not material, will not avoid the contract.[44] And there are other rulings here in a line with this decision holding that if the facts not disclosed are not material in the mind of the assured, the policy is not thereby vitiated, there being no intended or designed withholding or fraud.[45] Again, if such rul-

also, Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507; 2 Pet. (U. S.) 25. Here Mr. Chief Justice Marshall said: "The contract of insurance is one in which the underwriters generally act on the representations of the assured, and this ought consequently to be fair, and to omit nothing which it is material for the underwriters to know, and fair dealing requires that he should state everything which might influence the mind of the underwriter in forming or declining the contract. A building held under a lease, about to expire might be spoken of as the building of the tenant, but an offer for insurance stating this would be a gross imposition": McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170; Bombay v. Union Ins. Co., 2 Wash. (C. C.) 391.

[44] Jones v. Provincial Ins. Co., 3 Com. B., N. S., 55.

[45] Mallory v. Travelers' Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410, and see note 414; Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13; Schwartzbach v. Ohio Valley Prot. Union, 25 W. Va. 622; Hutchinson v. National Loan Assur. Soc., 7 Ct. Sess. Cas. (Scot.) 467; Moulor v. American L. Ins. Co., 111 U. S. 335. See, also, Horn v. American Mut. L. Ins. Co., 64 Barb. (N. Y.) 81; Wood v. Firemen's Ins. Co., 126 Mass. 316; Blackstone v. Standard L. & A. Ins. Co. (Mich.), 42 N. W. Rep. 156; Germania Ins. Co. v. Ruding, 80 Ky. 223. See Gates v. Madison Co. Ins. So., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360. See sec. 1870, herein.

ing be held not to express a sound view of the law, then where must the line of demarkation be drawn? All disorders of the system may have a tendency in some degree to shorten life. Must the assured give a careful and exact history of all his disorders, temporary illnesses, and the like, without regard to their permanent effect upon his physical health? If so, then it is doubtful if recovery could be had upon any life policy, for all lives would be rendered uninsurable. So if a disease proceeds from one of two causes, such as a defect of some of the vital organs or from a mere temporary disorder. In both cases it would have a tendency to shorten life, but in the latter the tendency would not be so great as in the former, for it would depend upon whether it existed to an excessive degree. If the assured failed to disclose such a disorder, would it be a material concealment? In a case of this character it was said that the parties could not have intended to include all disorders, and that it was properly left to the jury whether the disorder was organic or merely tended to shorten life by its excess.[46] The determination of the point whether there has or has not been a material concealment must rest largely in all cases upon the form of the questions propounded and the exact terms of the contract. Thus, where in addition to specifically named diseases the insured was asked whether he had had any sickness within ten years, to which he answered "No," and it was proven that within that period he had had a slight attack of pharyngitis, it was held a question properly for the jury whether such an inflammation of the throat was a "sickness" within the intent of the inquiry, and the court remarked on the appeal decision that if it could be held as a matter of law that the policy was thereby avoided, then it was a mere device on the part of insurance companies to obtain money without rendering themselves liable under the policy.[47] And a concealment of the fact that one has dyspepsia in its milder forms is not a fatal concealment.[48] And even in case where the question was whether the party had ever met with

[46] Watson v. Mainwaring, 4 Taunt. 763.

[47] Mutual B. L. Ins. Co. v. Wise, 34 Md. 582.

[48] Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162.

any accidental or serious injury, and the assured did not disclose the fact of an accidental fall from a tree, it was held that this was not a material concealment, as the injury was only a temporary one and did not affect the insured's health.[49] So a failure to disclose that a wound was received in the throat by fencing about a year prior to effecting the policy, which was only temporary in its effects is not fatal to the insurance.[50] Other cases might be cited showing the views taken by the courts upon matters of the above character. Thus, the fact that the deceased had failed to disclose that twenty years before he was ill with a fever and more or less insane, and four years before was insane, it was declared to be no evidence of a fraudulent concealment.[51] And even in case of a warranty it is held in England that if the assured states according to his own knowledge and reasonable belief that he has no diseases material to the risk, that this does not import a freedom from disease discoverable only by a post mortem, or symptoms disclosed subsequently to effecting the policy.[52]

§ **1849. Same Subject—Conclusion.**—The decisions seem to agree that the terms "sickness" and "disease" do not mean a trifling illness nor occasional physical disturbances resulting from accidental causes and not permanent in their effects, nor a temporary illness which readily yields to professional treatment and leaves no permanent physical injury or disorder calculated or having a tendency to shorten life; that an inquiry as to certain diseases must refer to that alone, and not to one not included within the term nor connected therewith in symptoms or effect upon the system.[53] If, however, the as-

[49] Wilkinson v. Connecticut Mut. L. Ins. Co., 30 Iowa, 119; 6 Am. Rep. 657; affirmed, 13 Wall. (U. S.) 222.

[50] Bancroft v. Home B. Assn. (N. Y.), 23 N. E. Rep. 997; 30 N. Y. St. Rep. 175; 19 Ins. L. J. 468.

[51] Mallory v. Travelers' Ins. Co., 47 N. Y. 52.

[52] Hutchinson v. National Loan Assur. Soc., 7 C. C. S. 467; 17 Scot. Jur. 253. See, also, Hollman v. Life Ins. Co., 1 Wood (C. C.), 674; Northwestern Mut. L. Ins. Co. v. Heimann, 93 Ind. 24; Thierolf v. Universal F. Ins. Co., 110 Pa. St. 371; 20 Atl. Rep. 412.

[53] Ross v. Bradshaw, 1 Wm. Black. 312; Chattock v. Shawe, 1 Moody & R. 498; Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535; Illinois Ma-

sured has actual knowledge as to the fact that the state of his health is such as to materially affect the risk and increase the hazard, it must be disclosed. If he has knowledge that certain sicknesses or disorders have permanently affected his general health, or that he was habitually and constitutionally subject to certain disorders affecting his general health, these facts should be disclosed. So, also, if he knows that he has an organic disease which impairs his vitality, and in general if his physical condition is such that he must as a reasonably intelligent man know that he has a sickness or disorder or disease which must in all probability tend to shorten his life, or if he knows within the same limitations that he has symptoms peculiar to specific diseases generally known to be permanently injurious to health, and which tend to shorten life, the sickness, disorder, disease, or symptom should be disclosed. But if the assured at the time of effecting the policy is in such a condition of health and strength as would warrant a reasonable and honest belief that his health is good, and that he is free from disorders and disease or symptoms of disease which would tend to shorten life, and this fact is not one which he ought reasonably to know, and he is not guilty of any negligence in failing to learn his physical condition, then his policy ought not to be vitiated, though he fails to disclose that he has had some disorder, sickness, or symptom of disease, even though

sons' B. Soc. v. Winthrop, 85 Ill. 537; Galbraith v. Arlington Mut. L. Ins. Co., 12 Bush (Ky.), 29; Mutual B. L. Ins. Co. v. Davies, 87 Ky. 541; 9 S. W. Rep. 812; Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 32 N. W. Rep. 610; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; Grangers' L. Ins. Co. v. Brown, 57 Miss. 308; Hoge v. Guardian etc. Ins. Co., 6 Rob. (N. Y.) 567; Metropolitan L. Ins. Co. v. McTague. 49 N. J. L. 587; 9 Atl. Rep. 766; Peacock v. New York L. Ins. Co., 20 N. Y. 293; 1 Bosw. (N. Y.) 338; Higbie v. Guardian Mut. L. Ins. Co., 53 N. Y. 603; Dreier v. Continental L. Ins. Co., 24 Fed. Rep. 670; Goucher v. Northwestern Traveling Men's Assn., 20 Fed. Rep. 596; Life Ins. Co. v. Francis, 17 Wall. (U. S.) 672; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250. The English cases, as a rule, are more strict in their enforcement of the rule as to concealment: See Maynard v. Rhode, 1 Car & P. 360; 3 L. J. K. B. 64; Geach v. Ingall, 14 Mees. & W. 95; 15 L. J. Ex. 37; Duckett v. Williams, 2 Cromp. & M. 348; Von Lindenau v. Desborough, 3 Car. & P. 353; 8 Barn. & C 586; 7 L. J. K. B. 42.

it might be actually material. The question should be left to the jury whether the assured truly represented the state of his health so as not to mislead or deceive the insurer; and if he did not deal in good faith with the insurer in that matter, then the inquiry should be made, Did he know the state of his health so as to be able to furnish a proper answer to such questions as are propounded?[54] A Massachusetts case, if construed as it is frequently cited, would be opposed to the above conclusion; but, on the contrary, it sustains it, for the reason that symptoms of consumption had so far developed themselves within a few months prior to effecting the insurance as to induce a reasonable belief that the applicant had that fatal disease, and we should further construe this case as establishing the rule that such a matter cannot rest alone upon the assured's belief irrespective of what is a reasonable belief, but that it ought to be judged by the criterion whether the belief is one fairly warranted by the circumstances.[55] A case in Indiana, however, held that if the assured has some affection or ailment of one or more of the organs inquired about so well defined and marked as to materially derange for a time the functions of such organ, as in case of Bright's disease, the policy will be avoided by a nondisclosure, irrespective of the fact whether the assured knew of such ailment or not.[56] This case would nevertheless be within the rule above stated by us, since such derangement of a vital organ would necessarily be a symptom calculated to induce a reasonable belief that the applicant had some disease which might permanently affect physical health. But, however, although one believes and af-

[54] Alabama Gold L. Ins. Co. v. Johnson, 80 Ala. 467; 2 S. Rep. 128; Swete v. Fairlie, 6 Car. & P. 1; Jones v. Provincial Ins. Co., 3 Com. B., N. S., 65; Hutchinson v. National Loan Assur. Soc., 7 Ct. Sess. Cas. (Scot.) 467; Watson v. Mainwaring, 4 Taunt. 763; Murphy v. Mutual B. L. & F. Ins. Co., 6 La. Ann. 518; Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125; Mallory v. Travelers' Ins. Co., 47 N. Y. 52; Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197; Montor v. American L. Ins. Co., 111 U. S. 335; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, and cases cited in last note.

[55] Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42.

[56] Continental L. Ins. Co. v. Young, 113 Ind. 159; 15 N. E. Rep. 220.

firms that he has not a disease, yet if the answers are made warranties, he answers at his peril. Neither his ignorance nor the immateriality of the fact concealed will aid him, and by numerous decisions, if he expressly stipulates that all his statements shall be material, the result would be substantially the same.[57]

§ **1850. Insurer's Knowledge.**—Lord Mansfield early stated the rule in marine insurances, already noted, that one party need not disclose facts known to the other, nor facts which the other ought to know.[58] Such being the rule in marine risks, it must govern in other insurances, especially in this country, where the rule is not so strict as to such other risks, and that this is the rule is well settled.[59] And the rule extends to the knowledge, actual or presumed, of the insurer's authorized agent.[60] Where the policy was directed by the insurer to be canceled because of rumored attempts to burn a building, and an insurance is thereafter effected by the plaintiff, it cannot avail the insurers as a defense that such fact of attempted burning was not disclosed.[61] But if the assured undertakes to state all the circumstances which can affect the

[57] Mutual B. L. Ins. Co. v. Cannon, 48 Md. 264; Powers v. Northeastern etc. L. Assn., 50 Vt. 630; Campbell v. New England Ins. Co., 98 Mass. 381. See chapter herein on warranties.

[58] Carter v. Boehm, 3 Burr. 1905; 1 Wm. Black 593, per Lord Mansfield, given herein under note in sec. 1845.

[59] Gray v. National B. Assur. Co., 111 Md. 531; Miller v. M. B. L. Ins. Co., 31 Iowa, 216; Lynn v. Commercial Ins. Co., 2 Rob. (La.) 266; Richards v. Washington F. & M. Ins. Co., 60 Mich. 420; Haley v. Dorchester Mut. F. Ins. Co., 12 Gray (Mass.), 545; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; Patten v. Merchants' Ins. Co., 40 N. H. 375; Leach v. Republic F. Ins. Co., 58 N. H. 245; Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Burritt v. Saratoga Mut. Ins. Co., 5 Hill (N. Y.), 188; Le Longuemere v. New York F. Ins. Co., 10 Johns. (N. Y.) 120; Fish v. Liverpool etc. Ins. Co., 44 N. Y. 538; Royal Canadian Ins. Co. v. Smith, 5 Russ. & Geld. (N. Sco.) 322 (one judge dissenting on the facts); Norris v. Insurance Co. of North America, 3 Yeates (Pa.), 84; Girard etc. Ins. Co. v. Stephenson, 37 Pa. St. 293; Money v. Union Ins. Co., 4 McCord (S. C.), 511; Clark v. Manufacturing Ins. Co., 8 How. (U. S.) 235; Perrine v. Lewis, 2 Fost. & F. 778. See sec. 1869, herein.

[60] Deitz v. Providence-Washington Ins. Co., 33 W. Va. 526; 11 S. E. Rep. 50.

[61] Fish v. Liverpool etc. Ins. Co., 44 N. Y. 538.

risk, he must do so fully and fairly. He will not be permitted to excuse himself by saying that he failed to communicate a fact because it was already known to the insurer.[62] If a policy is conditioned to be void in case of the concealment of any material fact, as if gasoline be used on the premises and the broker employed by the insured to procure insurance does not inform the insurer of the use of gasoline upon the premises such concealment will avoid the policy.[63]

§ 1851. Insurer's Knowledge—Constructive Knowledge from Examination by Surveyor.—If the insurer's act of incorporation requires it to appoint a surveyor to examine, survey and take a correct description of the property, to value the same, fix the premium, determine the conditions of insurance, and take into consideration the exposure and liability of the property to fire, the company is obligated to ascertain all material facts relating to the risk. And it cannot defend on the ground of material concealment that the insured did not disclose a fact which it was the duty of the surveyor to have ascertained.[64]

§ 1852. Insurer's Knowledge—Use of Insurance Map in Fire Risks.—In connection with the subject of insurer's knowledge we would suggest that what are known as "insurance maps" are used, the purpose of which is to furnish the insurer with definite and exact information of a certain character concerning fire risks. It would be proper, in case the defense of concealment is set up by the insurer, to ascertain whether the defendant regularly uses, as a matter of business these insurance maps, and if the fact alleged to have been concealed is proven to have been evident or capable of being learned from such map, that the insurer's defense ought not to avail. We have not, however, discovered any case wherein such a defense has been met with such proof to show the insurer's knowledge of the fact alleged to have been concealed; yet it is based upon the principle governing throughout the

[62] Stoney v. Union Ins. Co., 3 McCord (S. C.), 387; 15 Am. Dec. 634.
[63] Turnbull v. Home F. Ins. Co. (Md. 1896), 34 Atl. Rep. 875.
[64] Satterthwaite v. Mutual B. Ins. Co. Assn., 14 Pa. St. 393.

cases resting upon the knowledge or presumed knowledge of the insurer, and is analogous to the cases considered under the sections relating to information contained in newspapers subscribed to and regularly received by the underwriter.[65]

§ 1853. Insurer's Knowledge—Public Records of Title. If by the terms of the contract or by inquiry on the part of the insurers the assured's interest or title in the property becomes material, the insurer is not bound by the public records concerning title, but may rely upon the obligation resting upon the assured to disclose title so far as necessitated by such contract or inquiries.[66]

§ 1854. Insurer's Knowledge—Political Perils.—The insurer is presumed to have knowledge of the political or disturbed condition of the country at the time the policy is effected, and cannot claim that a fact is concealed which a knowledge of such disturbed political condition would have shown. Thus, where the property insured was in one of the southern states during the Civil War, it was held unnecessary to state that the guards smoked pipes and had fires in the immediate vicinity, or that the insured was obnoxious to numerous persons in the vicinity, or the property's liability to seizure.[67]

§ 1855. A Specific and Full Disclosure is Required, not an Evasive One.—Although the assured is not required to make other than a general statement of facts as a rule, and is not expected to go into details about which the insurer manifests no interest and makes no inquiry, especially where such matters are open to general observation,[68] yet a concealment of the true state of the property insured is a fraud,[69] a wide

[65] See secs. 1809-1812, herein, and last section.

[66] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[67] Keith v. Globe Ins. Co., 52 Ill. 518.

[68] Behee v. Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Towne v. Fitchburg Ins. Co., 7 Allen (Mass.), 51; Burritt v. Saratoga Mut. F. Ins. Co., 5 Hill (N. Y.), 188; Lynn v. Commercial Ins. Co., 2 Rob. (La.) 266.

[69] Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460. See Hardman v. Fireman's Ins. Co., 20 Fed. Rep. 594. But see cases in next note.

distinction, however, being made between those cases where there is no inquiry and those where questions are propounded by the insurer, and in all cases involving the point here under consideration, the express terms of the contract and the fact whether the assured has warranted a full and true disclosure are important factors.[70] But where a disclosure is required and is made, it should be full and complete, not partial, evasive, or calculated to mislead or deceive, omitting matters of importance and materiality which if disclosed would make the answer full; as in case of the concealment of a serious and recent sickness under a disclosure of a slight illness, or the partial disclosure of an accident resulting in a serious internal injury by a statement concerning the same in such terms as are intended to convey the impression that it was only slight. So if the answer made suggests a conclusion which is untrue; as where the insured in answer to an inquiry stated that he had made an application to a certain other company which he had withdrawn, when in fact he had applied to other companies and his application was rejected, thereby suggesting the conclusion that there was no objection to the risk. So also where the assured concealed marked symptoms of consumption under the statement that he could not say that he was afflicted with any disease or disorder, but was troubled with general debility of the system.[71] But in a New York case the assured, in answer to a question whether he had had any sickness or disease within a stated period and if so to give the name of the physician, merely disclosed a slight illness and the name of the attending physician, when in fact he had had a sickness not dis-

[70] See Clement v. Phœnix Ins. Co., 6 Blatchf. (C. C.) 481; Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452, per Ramsay, J.; Clark v. Manufacturers' Ins. Co., 8 How. (N. Y.) 235; Swift v. Massachusetts Mut. L. Ins. Co., 63 N. Y. 186; Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136; 17 Am. Rep. 72; Gates v. Madison etc. Ins. Co., 5 N. Y. (1 Seld.) 43, 169; Rawls v. American Mut. L. Ins. Co., 27 N. Y. 282.

[71] American Ins. Co. v. Mahune, 56 Miss. 192, per the court; Smith v. Ætna L. Ins. Co., 49 N. Y. 211; Vose v. Eagle L. & H. Ins. Co., 6 Cush. (Mass.) 42; Towne v. Fitchburg Ins. Co., 7 Allen (Mass.), 51; Story v. Williamsburgh M. etc. Assn., 95 N. Y. 474; Hartman v. Keystone Ins. Co., 21 Pa. St. 66.

closed, the name of the physician attending him during such illness not being given, and it was held that such evidence did not establish a breach of a warranty that the answers were "full, correct, and true." [72] Exceptions exist in all cases when the insurer waives his right to a full and complete answering, where it is apparent on the face of the application that the question is imperfectly answered.[73]

§ 1856. Concealment must be Referred to the Time of Making the Contract and not to a Subsequent Event.—We have already stated under the rule upon this point in marine risks that the concealment has reference not to the event itself, but to the materiality of the fact at the time the contract is made, and cannot depend upon subsequent events or facts learned after the contract is completed.[74] This rule is equally true in other risks. So if the policy provides that it will be void in case of an omission to make known any fact material to the risk, such condition must be held to refer to what existed at the time the contract was completed.[75] And if the contract is so far completed that the company may be held to have assumed the risk and a death or loss occurs before the policy is delivered, or in some cases even before the premium is paid, no obligation rests upon the party entitled to the benefit of the insurance to disclose the fact. This doctrine is well settled in this country.[76] So where a policy is effected on the assured's homestead, the docketing of a judgment against him after the contract is made does not vitiate it, even though there be a clause against encumbrances.[77]

[72] Dilleber v. Home L. Ins. Co., 69 N. Y. 256.

[73] See sec. 1870, herein.

[74] Pim v. Reid, 6 M. & G. 1; 12 L. J. Com. P. 299; Blood v. Howard F. Ins. Co., 12 Cush. (Mass.) 472. Section 1790, herein, and cases cited.

[75] Allemania F. Ins. Co. v. Pittsburg Exposition Soc., 10 Cent. Rep. 292.

[76] City of Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276; Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312; Keim v. Home Mut. F. Ins. Co., 42 Mo. 38; American Horse Ins. Co. v. Patterson, 28 Ind. 17. See, also, secs. 108, 103, 104, herein.

[77] Eddy v. Hawkeye Ins. Co. (Iowa), 30 N. W. Rep. 808.

§ 1857. Disclosure of Assured's Interest.—It is not obligatory upon the assured, as a rule, to disclose the nature or extent of his interest nor the particulars of his title, and a withholding of such fact will not avoid the policy in the absence of fraud or some requirement of the contract that the interest be disclosed, or some inquiry concerning the same. It is within the power of the insurer to protect himself by requiring a description of the applicant's interest. But if he does not, and the concealment is fraudulent to the prejudice of the insured, the policy is avoided.[78] Thus, the insured need not state that he is a chattel mortgagee,[79] nor that the buildings are upon land not owned by him, except the contract require such disclosure.[80] And where an insurance is applied for and granted on goods held in trust or on consignment, an omission to disclose the ownership is not a fatal concealment unless the policy requires such disclosure.[81] In cases of insurances effected in mutual companies where by the terms of the contract the premium notes constitute a lien upon the real property insured, the title of the assured becomes an important consideration, and a material concealment as to the same will vitiate the policy.[82] And it is held that if the assured occupies under an agreement to purchase, on which he has made payments but has no deed, he cannot by concealing this fact effect a valid policy upon it as his own for an amount larger than he has paid.[83] Even though the policy expressly stipulates for a full

[78] Morrison v. Tennessee etc. Ins. Co., 18 Mo. 262; 59 Am. Dec. 299; Wytheville Ins. etc. Co. v. Stultz, 87 Va. 629; 13 S. E. Rep. 77; 15 Va. L. J. 328; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Buck v. Phœnix Ins. Co., 76 Me. 586; Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442; Wooddy v. Old Dominion Ins. Co., 31 Gratt. (Va.) 362; Strong v. Manufacturers' Ins. Co., 10 Pick (Mass.) 40; 20 Am. Dec. 507. Policies need not disclose the nature of the interest of the assured unless some condition in them requires such disclosure: Riggs v. Commercial M. Ins. Co., 125 N. Y. 7; 21 Am. St. Rep. 716. See Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535.

[79] Norwich F. Ins. Co. v. Boomer, 52 Ill. 442.

[80] Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419.

[81] Phœnix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504. See sec. 1731, herein.

[82] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[83] Reynolds v. State etc. Ins. Co., 2 Grant Cas. (Pa.) 326. Contra,

disclosure of the assureds interest, great particularity is not necessarily required, but if the title is stated in general words such as clearly evidence its nature, it appears to be sufficient.[84]

§ **1858. Same Subject—Exception to Rule.**—But if the assured states the nature or extent of his interest, he must state it truly, and where no inquiry is made or statement given on the happening of a loss, he will recover according to his real interest, whether it be absolute or qualified,[85] the requirements of the contract or particular inquiries may necessitate a disclosure.[86] So if the nature of the assured's interest is such that it would influence the underwriter to charge a higher premium or not to insure at all, it must be disclosed, for it is material to the risk.[87]

§ **1859. Must an Equitable Title be Disclosed.**—In marine risks, as already noted, there seems to be some conflict

Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; 30 Am. Dec. 90. Section 1859, herein, and chapters on warranties and representations.

[84] Williams v. Roger Williams Ins. Co., 107 Mass. 377; 9 Am. Rep. 41; Washington F. Ins. Co. v. Keelly, 32 Md. 421; 3 Am. Rep. 149.

[85] Niblo v. North American F. Ins. Co., 1 Sand. (N. Y.) 551.

[86] See cases under first note in last section and cases in next note.

[87] Carpenter v. Washington Ins. Co., 16 Pet. (U. S.) 495; Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507, per Story J.; affirming s. c., 2 Pet. (U. S.) 25; Franklin Ins. Co. v. Coates, 14 Md. 285. In this case Bartol, J., said: "It is argued by the plaintiff that the policy was taken upon the property as if Coates was the owner of it, and that the omission to state the nature and character of the interest was a violation of the first condition in the policy, or that it was concealment of a fact material to the risk, and renders the policy void. We have dismissed the first condition. In the case of Columbia Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, it was decided that it was the duty of the assured to communicate to the insurer the nature and character of his interest when it is of a limited or special nature. This was reaffirmed in the same case at a later trial and in a case in 16 Peters the same principle is announced. It is conceded that the materiality of the disclosure or concealment is a question of fact, which must be submitted to the jury. None of the prayers of the defense present this question. They assume the ground that the appellees had no insurable interest, not having property in the building insured, or that the omission to communicate to the company the extent and nature of their interest rendered the policy void. It follows that none of these prayers could have been granted." And see opinion of Mr. Chief Justice Marshall in case above cited in note to sec. 1848, ante; Sussex Co. Ins. Co. v. Woodruff, 26 N. J. 541.

of opinion upon the point whether an equitable title must be disclosed to the insurer.[88] But in fire risks, if the insured has an equitable title in the property, as where he holds possession under a contract of purchase, the legal title being in another, it is held sufficient to describe the property as his, provided, however, no inquiry is made and the policy does not require that the exact title or character of the assured's interest shall be disclosed.[89] This question will, however, be more fully considered hereafter.[90]

§ 1860. Unusual or Extraordinary Circumstances of Peril to which Property is Exposed.—The insured must not, when he has knowledge actual or presumed thereof, withhold information of unusual or extraordinary circumstances of peril to which the property is exposed, where the same could not with reasonable diligence be discovered by the insurer or reasonably anticipated by him as the foundation of specific inquiries.[91] Thus, the omission to notify the insurer of a recent attempt to burn the building next to that on which insurance was sought is held to vitiate the policy obtained.[92] And where a policy was effected upon two warehouses, and the insured failed to disclose the fact that an adjoining building had been on fire at the time, and that the danger still existed from the probable breaking out again of the fire, the concealment was held to have vitiated the contract, even though no fraudulent

[88] See section 1822, herein.

[89] American Basket Co. v. Farinville Ins. Co., 3 Hughes (C. C.), 25; Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419; Insurance Co. v. Boomer, 52 Ill. 442; Rumsey v. Insurance Co., 17 Blatchf. (C. C.) 527; 2 Fed. Rep. 429, and cases cited; Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. St. 568; Jackson v. Farmers' Mut. F. Ins. Co., 5 Gray (Mass.), 52; Franklin F. Ins. Co. v. Martin, 11 Vroom (N. J.), 568; 29 Am. Rep. 271; Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149; Walsh v. Philadelphia F. Assn., 127 Mass. 383; Noyes v. Insurance Co., 54 N. Y. 668; Brick v. Phœnix Ins. Co., 76 Me. 586; Hough v. City F. Ins. Co., 29 Conn. 10. See sec. 1716, herein.

[90] See chapter on warranties and representation.

[91] Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684, per Ramsey, J.; North American F. Ins. Co. v. Throop, 22 Mich. 146; Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535. See next section, herein.

[92] Walden v. Louisiana Ins. Co., 12 La. 134; 32 Am. Dec. 116.

intent was proven; but it appeared that after the first fire was put out that the assured employed extraordinary means of conveyance to forward his instructions to his agent to effect insurance, showing clearly that his purpose in effecting the policy was caused by a fear of danger from fire.[93] In determining the materiality of the concealed fact that the house insured had prior to effecting the policy been on fire, caused in the opinion of the assured by incendiaries, the jury should inquire for and be governed by the true cause of the fire, and not by the belief of the assured as to the cause.[94] But the fact that lamps are used in the picker-room of a cotton factory upon which the insurance was effected is not a fact necessary to be disclosed where no representations are made or asked, even though the risk might have been thereby increased, unless such use of said lamps is unusual.[95] It is held, however, that an omission to disclose to the insurers repeated incendiary attempts to destroy the property insured will not avoid the insurance.[96]

§ 1861. Same Subject—Distinctions to be Observed. The distinction exists in all cases of this character between knowledge on the part of the assured of material facts and mere suspicions and rumors too remote and general to warrant a reasonable opinion or belief that the fact exists; in brief, mere idle talk, reports, and loose rumors, the source of which nobody knows, and which have not become so prevalent as to warrant any reasonable belief of their importance. Of necessity, the knowledge actual or presumed on the part of the assured that the property insured is located near other property wherein a hazardous occupation is carried on, or which is used for hazardous purposes, becomes material. This is a fact increasing the risk. The principle is one which runs through all the cases, marine or otherwise, that the assurer cannot be held responsible under a risk which he has assumed without a knowledge of facts which materially increase the lia-

[93] Buff v. Turner, 2 Wash. Rep. 46; 6 Taunt. 328.
[94] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684.
[95] Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235.
[96] Clark v. Hamilton Ins. Co., 6 Gray (Mass.), 148.

bility to loss, and of the existence of which he has no knowledge actual or presumed, and of which the assured has knowledge and ought in good faith to have disclosed.[97]

§ 1862. Apprehensions that Property is Exposed to Danger—Suspicions, Rumors, Opinions, and Speculations. In a line with what is stated under the last section is that class of cases where the assured has apprehensions that the property is exposed to danger. We have already considered the rule in marine risks in case of suspicions, rumors, reports, apprehensions, etc., and what we have there stated applies here, which is substantially this, that mere idle rumors, reports, and talks need not be disclosed, provided they are not too remote in their application to cause a reasonable belief, expectation, or fear that a material fact exists which would increase the risk were it known, and if there exists a reasonable apprehension of danger to the property, and the danger itself is of such a real and substantial character as would enhance the risk in the mind of an ordinarily prudent and intelligent man, the fact should be disclosed. But the assured is not bound to communicate his own expectations, opinions, and speculations upon facts, especially where it is not proven or claimed that he knew or had received information, true or false, which he has failed to communicate;[98] although if a specific inquiry is made concerning the assured's apprehensions as to a particular danger, and he answers contrary to the truth, he cannot recover.[99]

§ 1863. Where Insured's Belief, Apprehension, or Fear of Danger is the Moving Cause in Effecting Insurance.—If the insured's apprehension or fear of danger to the property

[97] See next section; Braggs v. American Ins. Co., 30 Mo. 63; McFarland v. Peabody Ins. Co., 6 W. Va. 425; Bell v. Bell, 2 Camp. 475; Kelly v. Hockelaga Mut. F. Ins. Co., 24 L. J. Jur. 298; Vale v. Phœnix Ins. Co., 1 Wash. (C. C.) 283.

[98] See sec. 1796, herein, and cases cited; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; McBride v. Republic F. Ins. Co., 30 Wis. 562, per the court; Graham v. Insurance Co., 6 La. Ann. 432; Walden v. Louisiana Ins. Co., 12 La. 134; Bell v. Bell, 2 Camp. 475; Vale v. Phœnix Ins. Co., 1 Wash. (C. C.) 283.

[99] Whittle v. Farinville Ins. Co., 3 Hughes (C. C.), 421. See sec. 2009, herein.

is the moving cause of procuring insurance, the rumor, report, information, or other apprehension or fear should be disclosed,[100] and the fact that it was the moving cause would undoubtedly be fairly evidenced by proof that the assured used extraordinary means of conveyance to forward his instructions to effect insurance.[101]

§ 1864. When Moral Character of Assured may become Material—Reinsurance.—The moral character of assured, that he had had difficulties concerning losses and was not in good repute among insurance companies in general may be material and necessary to be disclosed, as in case where such knowledge is possessed by the reassured at the time of effecting reinsurance.[102]

§ 1865. Belief that Property has been Destroyed.—If the assured at the time of effecting the insurance has reason to believe that the property has been destroyed, he should disclose that fact, and if he fails to communicate the same to the insurer, no recovery can be had upon the policy.[103]

§ 1866. Facts Implied from or Assured Put on Inquiry by Information Given—Waiver.—The assurer may waive his right to disclosure of material facts by his neglect to make inquiries as to material facts concerning which he has been distinctly put on inquiry by the facts stated. Thus, where the insured exhibited to the insurer an extract from a letter and the latter knowing of the fact that it was an extract from a letter does not ask to see the whole letter, there is no material concealment of a fact contained in the part not shown.

§ 1867. Whatever Affects the State or Condition of the Property at Time—Materiality.—It is a general rule

[100] Walden v. Louisiana Ins. Co., 12 La. (O. S.) 134. But see Smith v. Home Ins. Co., 47 Hun (N. Y.), 30.

[101] Rufe v. Turner, 6 Taunt. 338; 2 Marsh. Rep. 46.

[102] New York Bowery F. Ins. Co. v. New York F. Ins. Co., 17 Wend. (N. Y.) 359.

[103] Hart v. British & F. M. Ins. Co., 80 Cal. 440; 22 Pac. Rep. 302. See sec. 107, herein.

[104] Lovering v. Merchants' Ins. Co., 12 Pick. (Mass.) 348. See secs. 1788, 1870, 1871, herein.

that all material facts which directly tend to increase the hazard must be disclosed by the applicant,[105] and also whatever would influence a reasonable insurer, governed by the general rules applicable in such cases, to either reject the risk or to charge a higher premium must be stated.[106] So that within the limitations of these rules whatever materially affects the state or condition of the property at the time must be disclosed.[107] Thus, it is held that the failure of one insured from loss by fire to disclose in any material particular his title would very probably relieve the insurer from liability, although the policy contains no express provision to that effect.[108] So within the above test is the question whether a failure to disclose the occupancy, by two tenants instead of one, of the insured's premises is fatal.[109] So the fact that an adjoining building contains benzine should be stated.[110] So also whether the fact that the building is unoccupied is necessary to be stated.[111] But a mortgagee insuring in his own name need not disclose an agreement with the mortgagor that the latter should pay the premiums;[112] although if the insured undertakes to state all the circumstances which can affect the risk, he must do so fully and faithfully.[113] But it is held unnecessary to disclose, in the absence of inquiries, the fact as to the manner of heating or lighting the building, unless the manner of so doing is unusual.[114] The assured is not bound

[105] Keith v. Globe Ins. Co., 52 Ill. 518.

[106] Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 516, per Story, J.; Whitehurst v. Fayetteville etc. Ins. Co., 6 Jones L. (N. C.) 352; Boggs v. American Ins. Co., 30 Mo. 63; Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673; Hardman v. Fireman's Ins. Co., 20 Fed. Rep. 594. See sec. 1793, herein.

[107] Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Peoria Sugar Ref. Co. v. People's F. Ins. Co., 52 Conn. 581.

[108] Hinman v. Hartford F. Ins. Co., 36 Wis. 159, citing numerous cases.

[109] Hardman v. Fireman's Ins. Co., 20 Fed. Rep. 594.

[110] McFarland v. Peabody Ins. Co., 6 W. Va. 425.

[111] Thayer v. Providence-Washington Ins. Co., 70 Me. 531. But see Howard etc. Ins. Co. v. Counck, 24 Ill. 455.

[112] Kernochan v. New York Brewery Ins. Co., 17 N. Y. 428.

[113] Stoney v. Union Ins. Co., 3 McCord (S. C.), 387.

[114] Clark v. Manufacturing Ins. Co., 8 How. (U. S.) 235. See Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. St. 293; Elstner v. Equitable Ins. Co., 1 Disn. (Ohio) 412.

to report to the company the fact that personal property insured is under levy of execution at the time the application is made, and the insurance effected, where there is no fraud on the part of the assured, and the sheriff has never taken the goods out of his possession, and the policy contains no claim that the insurance shall cease, if the property should be levied upon or taken under execution, and there is nothing in the policy to warn the assured that the company regarded a levy as an increase of the risk.[115] If a married woman has an insurable interest in goods purchased by her on credit, her concealment of her coverture at the time of taking the policy is not a fact material to the risk, nor are her rights affected by private instructions to agents, uncommunicated to her, that they are not to issue insurance on stocks of merchandise in the hands of married women.[116]

§ 1868. What Constitutes a Material Fact—Must It be Material to the Risk.—We have considered this question fully under the chapter on marine insurance.[117] In connection, however, with risks of the character here considered, it is held that the rule where the question of materiality is involved is, that the fact concealed must be one which is material to the risk, otherwise it will not avoid the policy.[118] But this rule should be taken in connection with the other rule that if the fact concealed would have shown the liability of the insurer to loss to be greater than appears upon the facts disclosed, and would in consequence have induced a rational underwriter, governed by principles presumed to govern prudent and intelligent underwriters in practice, to have rejected the risk or to accept it only at an increased premium, it is material.[119] So it is held that whether a misrepresentation or

[115] Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504; 6 Am. St. Rep. 726.

[116] Queen Ins. Co. v. Young, 86 Ala. 424; 11 Am. St. Rep. 51.

[117] See secs. 1791-1793.

[118] Lexington etc. Ins. Co. v. Paver, 16 Ohio, 324; Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[119] Himely v. South Carolina Ins. Co., 1 Mills' Const. 153; 12 Am. Dec. 623; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Ingraham v. South Carolina Ins. Co., 3 Brev. (S. C.)

concealment will avoid the policy depends upon its materiality to the risk undertaken; and the policy would attach, unless the insurer had been induced to make it by reason of such concealment or misrepresentation of material facts, which if known to the company would have influenced it in making the contract.[120] So in a policy on a woman's life the fact of pregnancy will so far affect the risk as to be material and necessary to be disclosed, even though no inquiry is made.[121] Again, it is decided that where the insured property stood on a right of way of a railroad company, and the insured had released the company from liability for loss by fire caused by its locomotives, and such fact was not disclosed, there was no material concealment, it appearing that the insurer made no difference in rates with or without the right of subrogation, and there being no usage or custom showing the materiality of such right of subrogation among insurance companies.[122] But if the rate of premium would have been greater in consequence of such release, the case would have been brought within that of Tate v. Hyslop, already noted.[123] Where, however, specific inquiries are made, the matter has passed beyond the ground of materiality,[124] and where there is a warranty or where the conditions annexed provide that any concealment shall avoid the policy, the materiality of the fact concealed is not open to discussion, and in the last-mentioned instance concealment stands upon the same footing as a warranty.[125]

522; Hardman v. Fireman's Ins. Co., 20 Fed. Rep. 594; Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721; Boggs v. American Ins. Co., 30 Mo. 63; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 41 Fed. Rep. 271; Whitehurst v. Fayetteville etc. Ins. Co., 6 Jones (N. C.), 352.

[120] Mutual F. Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673.

[121] Lefavour v. Insurance Co., 1 Phila. (Pa.) 558.

[122] Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 4 Fed. Rep. 271.

[123] 15 Q. B. 368. Section 1836, herein.

[124] Fame Ins. Co. v. Thomas, 10 Ill. App. 545. See sec. 1869, herein.

[125] Burritt v. Saratoga etc. Ins. Co., 5 Hill (N. Y.), 188; 40 Am. Dec. 345; Barteau v. Phœnix Mut. Ins. Co., 67 N. Y. 595; Columbian Ins. Co. v. Cooper, 50 Pa. St. 331; Hardy v. Union Mut. F. Ins. Co., 4 Allen (Mass.), 217; Jeffries v. Economical L. Ins. Co., 22 Wall. (U. S.) 47.

§ 1869. Inquiries.—A party applying for insurance is bound to answer truthfully all questions concerning facts material to the risk,[126] and whether the insurance be a fire or life risk, if inquiries be made, the concealment of material facts is a fraud, and as fatal to the contract as a denial would be, and such concealment equally invalidates the insurance as in case of a marine risk.[127] It is not absolutely necessary that specific inquiries be made or designed to draw out every particular from the assured; it is sufficient if a general question covering the matter in point is asked, calculated to elicit the whole truth concerning the matter.[128] If an applicant for fire insurance answers frankly and truthfully all questions put to him as to the situation and exposures of the building to be insured, he discharges his duty if there be no fraud.[129] But if a direct question is asked and the answer purports to be complete, there must be no substantial misstatement or omission in the answer, else the policy will be avoided.[130] The fact that the insurer has knowledge does not excuse a disclosure of material facts when inquired about.[131]

§ 1870. Inquiries—Questions in Application Unanswered or Incompletely Answered—Waiver.—In the celebrated opinion of Lord Mansfield in Carter v. Boehm,[132] the rule is clearly stated that the insured need not mention what the underwriter "waives being informed of," and it is well settled that where the application for insurance is made in writing, and questions therein as to material facts are unanswered or incompletely answered, and the insurer without further

[126] Lueders v. Hartford L. & A. Ins. Co., 4 McCrary (C. C.), 149.

[127] Smith v. Ætna L. Ins. Co., 49 N. Y. 211; Burritt v. Saratoga etc. Ins. Co., 5 Hill (N. Y.), 188; 40 Am. Dec. 345.

[128] Vose v. Eagle etc. Ins. Co., 6 Cush. (Mass.) 42.

[129] Gates v. Madison Co. etc. Ins. Co., 5 N. Y. (1 Seld.) 469; 55 Am. Dec. 360.

[130] Phœnix L. Ins. Co. v. Raddin, 120 U. S., 183; Cazenove v. British Equitable Assur. Co., 29 L. J. Com. P., N. S., 160; affirming 6 Com. B., N. S., 437.

[131] Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; North American F. Ins. Co. v. Throop, 22 Mich. 146.

[132] 3 Burr. 1905; 1 Wm. Black. 593, given in note to sec. 1845, herein.

inquiry issues the policy, he must be held to have waived all right to a disclosure or more complete answer in relation to the fact to which the unanswered question or incompletely answered question relates, and the policy cannot thereafter, in the absence of clear proof of a fraudulent suppression of the fact, be avoided on the ground of concealment or that the answer is incomplete. The applicant in such case has the right to suppose that the insurer, in making inquiries as to certain facts, waives all voluntary information concerning all others. This rule applies equally whether the risk be that of fire, life, or accident, and the contract will be considered as based on the answers made.[133] Thus, it is said by Mr. Justice Gray in the United States supreme court that "where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers

[133] O'Neill v. Ottawa Agr. Ins. Co., 30 U. C. C. P. 151; Keith v. Globe Ins. Co., 52 Ill. 518; Pennsylvania Mut. L. Ins. Co. v. Miller, 100 Ind. 92, 98, per the court; Daly v. John Hancock Mut. L. Ins. Co., 65 Ind. 6; Jemison v. State Ins. Co., 85 Iowa, 229; 52 N. W. Rep. 185; Bardwell v. Conway Ins. Co., 122 Mass. 90; Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136; 17 Am. Rep. 72; Nichols v. Fayette Mut. F. Ins. Co., 1 Allen (Mass.), 63; Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co., 7 Gray (Mass.), 261; Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.), 265; Haley v. Dorchester Mut. F. Ins. Co., 12 Gray (Mass.), 545; Tiefenthal v. Citizens' Mut. F. Ins. Co., 53 Mich. 306; Sibley v. Prescott Ins. Co., 57 Mich. 14; Baker v. Ohio Farmers' Ins. Co. (Mich.), 14 West. Rep. 438; American L. Ins. Co. v. Mahone, 56 Miss. 180; Brink v. Guaranty Mut. Acc. Assn., 7 N. Y. Sup. Ct. 847; 28 N. Y. St. Rep. 921; Edington v. Mutual L. Ins. Co., 67 N. Y. 185; Higgins v. Phœnix Mut. L. Ins. Co., 74 N. Y. 9; Browning v. Home Ins. Co., 71 N. Y. 508; Rawle v. American M. L. Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280; Carson v. Jersey City F. Ins. Co., 43 N. J. L. (14 Vroom) 300; 39 Am. Rep. 584; 44 N. J. L. (15 Vroom) 210; Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176; Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452, per Ramsay, J.; Dayton Ins. Co. v. Kelley, 24 Ohio St. 345; Lebanon Ins. Co. v. Keepler, 106 Pa. St. 28; Armenia Ins. Co. v. Paul, 91 Pa. St. 520; 36 Am. Rep. 676; Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183; Connecticut Ins. Co. v. Luchs, 108 N. Y. 498; Hosford v. Germania F. Ins. Co., 127 U. S. 196; 8 Sup. Ct. Rep. 1199; West Rockingham etc. Ins. Co. v. Sheets, 26 Gratt. (Va.) 854; Dunbar v. Phœnix Ins. Co., 72 Wis. 492; 40 N. W. Rep. 386; Campbell v. American F. Ins. Co., 73 Wis. 100; 40 N. W. Rep. 661; Dodge Co. Mut. Ins. Co. v. Rogers, 12 Wis. 337. But see Chrisman v. States Ins. Co., 18 Pac. Rep. 466.

issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial."[134] In a Virginia case the rule is thus substantially stated: If a policy of insurance does not require that the insured shall state the liens or encumbrances on the property insured or his title thereto, and no questions are asked of him by the insurer, the policy is not avoided by his failure, without any fraudulent intent, to mention a lien upon it.[135]

§ **1871. Same Subject Continued.**—In Massachusetts an innocent failure by an applicant for fire insurance to communicate facts about which he was not asked will not avoid the policy.[136] And the rule stated in the last section applies even though the policy by its terms requires a full disclosure concerning the matters to which the question relates,[137] and so even though the applicant has answered in the negative another interrogatory whether there are any other circumstances affecting the risk.[138] It also applies to the applicant's

[134] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183. The language of the court is particularly noteworthy in its criticism of the remarks of Sir George Jessel, M. R., in delivering the judgment in the case of London Assur. Co. v. Mansel, 11 Ch. D. 363. See Forbes v. Edinburgh L. Ins. Co., 10 Ct. Sess. Cas. (Scot.) 451; Cazenove v. British Equitable Assur. Co., 29 L. J. Com. P., N. S., 160; affirming 6 Com. B., N. S., 437; Roos v. London etc. Ins. Co., 12 U. C. Ch. 311. Since it clearly distinguishes between the views taken by the English courts and our own, Mr. Justice Gray says that "so much of the remarks of" said court "as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform consent of American decisions": Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183, per Gray, J.

[135] West Rockingham etc. Ins. Co. v. Sheets, 26 Gratt. (Va.) 854.

[136] Washington Mills Emery Mfg. Co. v. Weymouth etc. Mut. F. Ins. Co., 135 Mass. 503.

[137] Dunbar v. Phœnix Ins. Co. (Wis.), 40 N. W. Rep. 386, and cases cited under first note.

[138] Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co., 7 Gray (Mass.), 261.

refusal to answer, whether the question was propounded separately or in connection with others.[139] It must be assumed that if further answers had been insisted upon at the time, that they would doubtless have been given, it would be virtually a fraud for the insurer to ignore the fact of the nonanswer, accept the premiums, and then, in case of loss, be enabled to assert and sustain the defense of nondisclosure concerning the matter to which the unanswered questions relate.[140] So the case of insurances issued without any application or upon oral applications rests upon substantially the same basis. If the insurer issues a policy without requiring any written application or any representation concerning the situation, value, and risk of the property insured, and there is no fraudulent suppression of material facts, or in case a printed slip is furnished describing the property only in the most general terms, and the insurers issue the policy upon their own examination, they cannot after loss avail themselves of their own negligence in failing to make proper inquiries to defeat the policy,[141] although it is also held that if there is no application the assured is bound by the conditions of the policy upon his acceptance of the same without objection.[142] It is held, however, in a federal case that where a policy required a disclosure on the part of the insured, and did not require the insurer to make inquiry or to request information, a waiver of this condition of the policy cannot be presumed from the mere fact that the assured was not requested to make disclosure, and no inquiry was made upon the subject.[143] Sometimes the pol-

[139] American L. Ins. Co. v. Mahone, 56 Miss. 180.

[140] Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176, per the court.

[141] Pelzer Mfg. Co. v. Sun Fire Office (10 cases), 36 S. C. 213; 15 S. E. Rep. 562; Hoose v. Prescott Ins. Co., 84 Mich. 109; Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123; Baker v. Ohio Farmers' Ins. Co. (Mich.), 14 West. Rep. 438; Cristock v. Royal Ins. Co., 87 Mich. 428; 49 N. W. Rep. 634; affirming 47 N. W. Rep. 549; Hall v. People's Mut. F. Ins. Co., 6 Gray (Mass.), 185; Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136; 17 Am. Dec. 72; Western & Atlantic Pipe Lines v. Home Ins. Co. (Pa. 1892), 22 Atl. Rep. 665; 21 Ins. L. J. 24. See sec. 496, herein, and cases.

[142] Swan v. Watertown F. Ins. Co. (Pa.), 10 Ins. L. J. 392.

[143] Waller v. Northern Assur. Co., 2 McCrary (C. C.), 637.

icy provides that unanswered questions shall be construed in favor of the insurers.[144]

§ 1872. Same Subject—Distinctions to be Observed.—In applying the above rules it should be remembered that a distinction clearly exists between an answer which is apparently on the face of the application incomplete and imperfectly answered, and one which is apparently complete, but yet in fact incomplete, untrue, and calculated to mislead and deceive by attempting, under the guise of a full and complete answer, to partially or evasively state the fact inquired about, for if the answer purports to be complete, full, and true, and the policy is issued on the facts thereof, it is avoided if there be any substantial misstatement or omission.[145] And within this distinction exist cases of unusual or extraordinary circumstances of peril to which the property is exposed, information concerning which is withheld within the rule already stated.[146]

§ 1873. When Subsequent Reception of Premium no Waiver of Concealment.—If the fact concealed is material and the company cannot be charged with knowledge of its existence at the time, the fact that the company accepts the premium cannot operate as a waiver to bind the company.[147]

§ 1874. Concealment of Same Facts from Other Insurers.—The assurer cannot show, as evidence in defense of

[144] Haley v. Dorchester Mut. F. Ins. Co., 12 Gray (Mass.), 545, based upon an application which provided that "questions not answered should be construed most favorably to the risk." . . . . In his instruction to the jury, Huntington, J., said: "That so far as no answers were given to questions in the application, they might find that the company waived such answers, but that the company must have the benefit of the provision in the contract; that such provision should be construed most favorably to the risk, and that any material concealment or concealment of a material fact would avoid the policy."

[145] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 783, per Gray, J. See sec. 1855, herein; Moulor v. American Ins. Co., 111 U. S. 335; Cazenove v. British Equitable Assur. Co., 29 L. J. Com. P., N. S., 160; affirming 6 Com. B., N. S., 437.

[146] See sec. 1860, herein.

[147] Allen v. Fire Ins. Co., 12 Vt. 366.

an action against it, that the assured has effected insurance in other companies by a concealment of the same facts.[148]

§ 1875. Other Matters—Code Provisions, etc.—General Statements.—We have considered under this chapter the principal points involved in decisions relating particularly to other than marine risks. As to such other questions as may arise we refer to the code provisions and general principles stated under the preceding chapter, having in view the general rule that in this country the rule as to concealment in other risks is not so strict as in marine insurances; and we also refer to the numerous cases under the chapter on warranties and representations hereinafter noted.

[148] People's Ins. Co. v. Spencer, 53 Pa. St. 353; 91 Am. Dec. 217.

CHAPTER XLIV.

REPRESENTATIONS AND MISREPRESENTATIONS.

§ 1882. Representations and misrepresentations—Generally.
§ 1883. Representations, defined.
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§ 1885. Representations may be oral or written.
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§ 1900. Representation may be of facts intentionally false.
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§ 1928. Statements volunteered and irrelevant: Irresponsive answers.
§ 1929. Ambiguous or doubtful representations.
§ 1930. Answers to ambiguous or doubtful questions.
§ 1931. Representations false as to part of property: Entire or severable contract.
§ 1932. Representations of third parties: Parties referred to.
§ 1933. Representations may be changed, modified, altered, or withdrawn.
§ 1934. Construction of representation.
§ 1935. Rules as to representations apply to modification of contract.

§ 1882. Representations—Misrepresentations—Generally.—That a distinction exists as to their legal effect between representations and warranties is unquestioned, for a representation is clearly distinguishable from a warranty. The former is part of the proceedings which propose a contract, while the latter is a part of the completed contract, either expressly inserted therein or appearing therein by express reference to statements expressly made a part thereof. The falsity of the former may render the contract voidable for fraud; but a noncompliance with the latter is an express breach of the contract.[1] But this distinction is dependent

[1] Wheaton v. North British Ins. Co., 76 Cal. 415; 9 Am. St. Rep. 216. There is a distinction between a warranty and representation;

upon the proviso that it is once ascertained exactly what constitutes a representation and what a warranty. When this point is reached the law is comparatively clear. But there is a difficulty in formulating a certain positive rule which shall determine what constitutes a representation and what a warranty in a contract of insurance.[2] In the consideration of this question the fact is important to be noted that while the contract is evidenced by the policy, the application, plan, survey, and other papers and documents may be expressly or otherwise made a part of the policy, and it is not infrequently that a question arises as to the sufficiency of a reference to other papers, etc. So again in mutual companies and societies the charter, articles of association, constitution, and by-laws are generally made a part of the contract;[3] and the statutes of certain states contain express provisions on this subject.[4] Another point should be

the first being a part of the contract, and the latter only a part of the proposal: Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405. "A representation differs from an express warranty in this respect, viz.: That the former does not, and the later does, appear in the policy. A statement which if collateral to the policy only amounts to a representation, acquires the force of a warranty if inserted in the instrument": McArthur on Marine Insurance, ed. 1890, 5. "There is a material difference between a representation and a warranty; a warranty is always part of the written policy, and must appear upon the face of it; but a representation is only a matter of collateral information on the subject of the insurance, and makes no part of the policy. A warranty must be strictly and literally complied with; but it is sufficient if a representation be substantially correct": Ellis on Fire and Life Insurance and Annuities, ed. 1834, pp. 18, *30; Hammond on Fire Insurance, ed. 1840, 82.

[2] Daniels v. Hudson F. Ins. Co., 12 Cush. (Mass.) 416, per Shaw, C. J.

[3] Insurance Co. v. Whitefield, 31 Md. 219; Dwight v. Germania L. Ins. Co., 103 N. Y. 341; 57 Am. Rep. 729; Supreme Commandery v. Ainsworth, 71 Ala. 736; Kelsey v. Universal L. Ins. Co., 35 Conn. 236; Bauer v. Sampson Lodge etc., 102 Ind. 262; Phœnix Ins. Co. v. Bennett, 87 Md. 132; Miller v. Assurance Assn., 42 N. J. Eq. 459; Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 54; Simeral v. Dubuque Mut. etc. Co., 18 Iowa, 322; Cushman v. United States L. Ins. Co., 59 N. Y. 557; 17 Am. Rep. 372; Clevenger v. Mutual L. Ins. Co., 2 Dak. 114. See c. vii, herein.

[4] White v. Connecticut Mut. L. Ins. Co., 4 Dill. (C. C.) 177. See sec. 190, herein.

considered, and that is, that great strictness has always prevailed in contracts of marine insurance, and that between these risks and fire contracts a difference exists in the knowledge of facts upon which the respective contracts are founded, especially where the agent examines the property or fire insurance maps are used. That also in life risks the questions propounded are generally so framed as to specifically cover all material points, and that some consideration must be given to the fact that in matters relating to disease, sickness, and the like the assured ordinarily has no special knowledge concerning the human system or the vital organs, and again, at the present time the life insurers rely largely, if not entirely, upon their own medical advisers.[5]

§ **1883. Representations Defined.**—A representation is an oral or written statement which precedes the contract of insurance, and is no part thereof, unless it be otherwise stipulated, made by the assured or his authorized agent to the underwriter or his authorized agent, and relates to facts necessary to enable the underwriter to form his judgment whether he will accept the risk and at what premium.[6]

[5] Campbell v. Merchants' etc. Ins. Co., 37 N. H. 41; 72 Am. Dec. 324, per Eastman, J.; Horn v. American etc. Ins. Co., 64 Barb. (N. Y.) 81; and sec. 206, herein, where both the above cases are noted.

[6] Buford v. New York L. Ins. Co., 5 Or. 334; Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467; Higbee v. Guardian Ins. Co., 66 Barb. (N. Y.) 462; affirmed, 53 N. Y. 603; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506, and cases under section next following. "A representation, in the technical sense which the word bears to the law of insurance, is an oral or written statement made by the assured or his agent at the time of effecting the insurance, whereby the underwriter is more readily induced to enter into the contract than he would otherwise have been": McArthur on Marine Insurance, ed. 1890, 5, citing Williams, J., in Behn v. Burness, 32 L. J. Q. B. 204, 205; Arnould on Marine Insurance, 6th ed., 514; Marshall on Insurance, 4th ed., 345. *Representation, defined, when material:* "A representation in insurance is in the nature of a collateral contract, either by writing not inserted in the policy or by parol, and is a communication of facts and circumstances relative to the insurance made to the underwriters, with a view to enable them to estimate the risk and calculate the premium to be paid. A representation is said to be material when it communicates any fact or circumstance that may be reasonably supposed to influence the judgment of the underwrit-

§ 1884. Misrepresentation Defined.—A misrepresentation in insurance is an oral or written statement made by the assured or his authorized agent to the underwriter or his authorized agent of something as a fact which is untrue, is known to be untrue, and is stated with intent to mislead or deceive, or which is stated positively as true without its being known to be true, and which has a tendency to mislead, such statement relating in both cases to material facts.[7]

§ 1885. Representation may be Oral or Written.—A representation may be oral or written, made by the assured or his agent, but is not written on the face of the policy.[8] Warranties are not favored by construction; they should be express. The fact that a statement is not written on the policy itself would, in the absence of some stipulation evidencing the contrary, show an intent to have such statement considered a representation.

§ 1886. Representation Precedes the Contract.—A representation precedes the contract, being an inducement to it. It is a statement made to the insurer, before the subscription of the policy or its completion, with reference to the proposed contract and as part of the preliminary proceedings.[9]

ers in undertaking the risk or calculating the premium, and whatever may be the form of expression used by the insured or his agent in making a representation, if it have the effect of imposing upon or misleading the underwriter, it will be material and fatal to the contract": Ellis on Fire and Life Insurance and Annuities, ed. 1834, pp. 18, *29.

[7] Daniels v. Hudson River Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721. See cases throughout this chapter.

[8] Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Livingston v. Delafield, 1 Johns. (N. Y.) 523; 3 Caines (N. Y.), 49; Vandervorst v. Smith, 2 Caines (N. Y.), 155, per Thompson, J.; Pawson v. Watson, Cowp. 788; Pawson v. Barnewalt, Doug. 12, n. 4; Deering's Annot. Civ. Code Cal., sec. 2571. See sec. 1888, herein.

[9] Dewees v. Manhattan Ins. Co., 34 N. J. L. 244; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467; Buford v. New York L. Ins. Co., 5 Or. 334; Higbee v. Guardian Ins. Co., 66 Barb. (N. Y.) 462; affirmed,

§ 1887. Representation is Collateral to but no Part of the Contract.—A representation is not per se of the essence of the contract, but is merely collateral to it. It is a preliminary statement of material facts or circumstances relating to the proposed adventure, and made for the information of the assurer, such statements being either proposed by the assured or made in answer to questions by the assurer, the purpose of which is to enable the latter to form a just estimate of the risk and to determine whether he will accept or reject the same, and what premium he will charge if he accepts.[10] A representation is not necessarily a part of the contract, but is an inducement thereto,[11] and if neither the policy nor application stipulates that the answers are made warranties, or are in effect made warranties, they are representations, as a general rule.[12] A bare reference to an annexed paper is not sufficient in itself to make it a part of the contract and the statements therein warranties.[13] So if there are no words to indicate that the parties intended that the statements in the appli-

53 N. Y. 603; Vandervorst v. Smith, 2 Caines (N. Y.), 155, per Thompson, J.; Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697; Deering's Annot. Civ. Code Cal., sec. 2572.

[10] Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 467, per Somerville, J.; Vandervorst v. Smith, 3 Caines (N. Y.), 155, per Thompson, J.; Buford v. New York L. Ins. Co., 5 Or. 334; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Kentucky Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Pawson v. Watson, Cowp. 785, per Lord Mansfield; Higbee v. Guardian Ins. Co., 66 Barb. (N. Y.) 462; affirmed, 53 N. Y. 603; Williams v. New England etc. Ins. Co., 31 Me. 219; Bize v. Fletcher, Doug. 271, per Lord Mansfield; Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 315; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Goddard v. East Texas F. Ins. Co., 67 Tex. 69; 1 S. W. Rep. 906; Simond v. Boydell, Doug. 271, per Lord Mansfield.

[11] Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405. "A representation precedes the contract of insurance, and is no part of it." "A warranty is a part of the contract, and must be exactly and literally fulfilled. . . . . A warranty is a binding agreement that the facts stated are true. The assured by his warranty engages that whatever may be the condition of things when he makes his application, the facts shall be as warranted when the policy attaches": Flanders on Fire Insurance, 2d ed., 222, 226, 227.

[12] Cushman v. United States L. Ins. Co., 4 Hun (N. Y.), 783.

[13] Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383; Cumberland Valley Mut. Prot. Co. v. Mitchell, 48 Pa. St. 374.

cation should be considered other than representations, they will be so held.[14] It is held, however, that in actions on life policies the application and policy are to be construed together as one instrument.[15] So representations in the application for a policy which provide for the avoidance thereof if such representations are false or insufficient should be considered as part of the contract, to the same effect as if they were recited and set forth at large in the policy.[16] In case of mutual benefit and like societies doing an insurance business, the courts are inclined to construe the statements in the application as representations, even though it be therein provided that they shall be held warranties; although if they are incorporated in the policy and stipulated as warranties, it would be otherwise.[17]

§ 1888. Same Subject—The View that Representations are a Part of the Contract.—Although the law as stated under the last section seems to be settled by a long course of judicial decisions both in England and this country, nevertheless Mr. Duer advances the proposition that a positive representation is not collateral to, but is actually a part of, the contract to which it relates. The object of his discussion, for he enters into an exhaustive argument in support of the proposition, is to prove that the substantial truth of the representation is a condition precedent to the right of the assured to recover; that the question of constructive fraud is eliminated where the representation is not substantially true, and the avoidance of the policy in such case rests alone upon a breach of the contract.[18] This idea is perhaps in a line with the suggestion by Mr. Ellis

[14] Campbell v. New England L. Ins. Co., 98 Mass. 381.

[15] Studwell v. Mutual B. L. Assn. of America, 19 N. Y. Supp. 709.

[16] Houghton v. Manufacturers' etc. Ins. Co., 8 Met. (Mass.) 114; 41 Am. Dec. 489.

[17] Illinois Masons' etc. Soc. v. Winthrop, 85 Ill. 537; Grossman v. Supreme Lodge (N. Y.), 22 N. Y. St. Rep. 522; Clapp v. Mutual B. Assn., 146 Mass. 519; 16 N. E. Rep. 433; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593. See Co-operative Assn. v. Leflove, 53 Mass. 1; and sec. 1891, herein.

[18] 2 Duer on Marine Insurance, ed. 1846, 644, et seq., 738, et seq., 766, et seq.

that a "representation in insurance is in the nature of a collateral contract." [19] The proposition also derives some support from a Massachusetts marine case, where it is held that a positive representation is as essentially a part of the contract as a warranty, and must be literally true, otherwise the underwriter is not bound. In this case the representation was that the ship had arrived safe and was clear of her cargo, when in fact she was entering the harbor, was grounded upon the bar, and sustained injuries.[20] And it is also held in another case that the description of property in an application for insurance is, strictly speaking, a part of the contract only so far as it defines the subject matter.[21] And Chancellor Kent is evidently in accord with the proposition, at least to the extent of asserting that in the absence of actual fraud there is no other fraud than exists in every case where a party relies on a promise that is unfulfilled.[22] In cases of actual fraud, however, Mr. Duer himself admits that a representation is a collateral statement and no part of the agreement, and considers that whatever fallacy exists is in cases of constructive fraud.[23] But if the misrepresentation be of facts, inasmuch as insurance is a contract uberrimae fidei, such misrepresentation must be deemed equivalent to fraud.[24] Mr. Phillips objects to the "anomalous application of the technical terms 'fraud' and 'fraudulent' to many of the misrepresentations" held to defeat the policy, and says the subject is one of implied stipulation, or rather rests upon the ground of an implied condition that there is no misrepresentation in analogy with implied warranties, such as seaworthiness, etc.[25] Mr. Arnould considers somewhat at length

[19] Ellis on Life and Fire Insurance, 29, cited in Alston v. Mechanics' Mut. Ins. Co., 4 Hill (N. Y.), 334, per Walworth, Ch.

[20] Sawyer v. Coasters Mut. Ins. Co., 6 Gray (Mass.), 221, per Metcalf, J. See, also, Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200; Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 540; Burritt v. Saratoga Co. Mut. F. Ins. Co., 5 Hill (N. Y.), 188, per Bronson, J.

[21] Howard Ins. Co. v. Bruner, 23 Pa. St. 50.

[22] 3 Kent's Commentaries, 5th ed., 282.

[23] See substance of Mr. Duer's argument noted above. See Cornfoote v. Fowke, 6 Mees. & W. 378, per Lord Abinger.

[24] Elkin v. Jansen, 13 Mees. & W. 659, per Baron Burke.

[25] 1 Phillips on Insurance, 3d ed., 287, sec. 537.

Mr. Duer's proposition, but concludes that it is not in accord with the cases, and that whether legal fraud, actual or constructive, or a virtual breach of contract be taken to be the ground on which misrepresentation avoids the contract, parol evidence is equally admissible of representations made at the time of effecting the policy to merely control or explain the written contract whenever they are not inconsistent therewith.[26]

§ 1889. What Weight Should be Given the Theory that Representations are a Part of the Contract.—We have seen that a representation precedes the contract, is preliminary to its completion or subscription, and is of a material fact, and one which operates as an inducement to the risk, and upon which the underwriter bases his judgment in accepting or rejecting the same and fixing the premium. The contract of insurance is peculiarly one of the utmost good faith, especially in marine risks, and it is an implied condition that the good faith required shall be strictly observed in all negotiations and representations materially affecting the contract. A representation materially untrue or false, or actually fraudulent, is a breach of the condition on which the contract is based, and therefore necessarily vitiates the contract. It is difficult to conceive of a rule which shall make a representation not expressly or impliedly embodied in said contract a part thereof, or rather a collateral agreement, so as to bind the insured by a breach thereof the same as if it were embodied therein, when the very purpose of reducing the contract to writing is to have some certain evidence of what the exact agreement is between the parties. To admit evidence that the contract was induced by fraud, misrepresentation, or deceit or evidence of the terms of the representation when they do not contradict or materially vary the express terms of the writing, is not inconsistent with legal principles, and is a safe rule sanctioned by a long course of judicial decisions.[27] Some discussion has arisen in regard

[26] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 500, et seq., *496, et seq.

[27] See McVery v. Grand Lodge A. O. U. W., 53 N. J. L. 17; 20 Atl. Rep. 873. See, also, cases cited under sec. 1887, herein.

to the validity or existence of an oral promissory representation, and the words of the court in a New York case are pertinent in this connection, and will be noted under the consideration of the question of promissory representations.[28]

§ 1890. Statements which are Part of Contract may Sometimes be Representations.—Although a representation is not generally written in or made a part of the contract, yet the rule does not preclude the insertion of statements of matters relating to the risk in the policy, under an express stipulation that they are not to be deemed warranties. So if it appears from the whole policy that the statements are not intended as warranties, they will not be so held.[29] So a representation may be implied from the words used in the policy; as where by the terms of the policy the adventure was to begin from the loading, and the risk was at and from a named port, it was held that the words were not a warranty to load at the designated port, but a representation as to a material fact, which being untrue avoided the contract.[30] In a voyage policy the legal import of the words "at and from the loading of the goods on board" is that the goods must be loaded at the port of departure specified.[31] The words "clerk sleeps in the store" in an application for insurance, copied into the policy, are a mere description and not a warranty,[32] and the question whether a statement is a representation merely or a warranty is dependent largely upon the form of expression and the apparent purpose of the statement, with a tendency on the part of courts to favor a construction that they are representations in cases of doubt.[33] So where certain explanations and declarations are inserted by the assurer in the application specifying the degree

[28] Alston v. Mechanics' Mut. Ins. Co., 4 Hill (N. Y.), 334, per Chancellor Walworth.

[29] National Bank of D. O. Mills etc. v. Union Ins. Co. (Cal.), 26 Pac. Rep. 509.

[30] Hodgson v. Richardson, 1 Black. 463.

[31] Spitta v. Woodman, 2 Taunt. 416; Homeyer v. Lushington, 15 East, 46. See Nonnen v. Kettlewell, 16 East, 176.

[32] Frisbie v. Fayette Ins. Co., 27 Pa. St. 325.

[33] Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 467; Reid v. Harvey, 4 Dow, 97.

of responsibility to be assumed in answering questions, and it may reasonably be deduced therefrom that a strict warranty was not intended, and it appears that the assured was thereby induced to answer the questions and to enter into the contract, such answers will be held only representations, notwithstanding the application is made a part of the contract, and the term "warranty" is employed to designate the character of the statements.[34] So in a policy upon thirty-six mules, the words "all contained in the two-story framed barn (36 by 100 ft.) situate on sec. No. 19," etc., are held to be merely matter of description and not a warranty;[35] and where an application for life insurance warranted that the answers therein were correct and true, and declared that if any of them should be in any material respect untrue or false, or tend to deceive the insurer, the contract should be void, it was held a mere reprsentation and not fatal, unless fraudulently false.[36] Again, a policy of life insurance declared upon its face to be upon the following condition: "If the statements made by or in behalf of or with the knowledge of the said insured to said company, as the basis of or in the negotiations for this contract, shall be found in any respect untrue," then and in each of said cases this policy shall be null and void. It was held that the answers contained in the application were in the nature of representations only, and that in order to defeat the policy they must be shown to be materially untrue, or untrue in some particular material to the risk.[37]

[34] Fitch v. American etc. L. Ins. Co., 59 N. Y. 557; 17 Am. Rep. 372. The facts in the case upon which this rule is based are these: In an application and policy the statements of the insured were declared to be warranties and the basis of the contract, but in other parts of the application it was stated, in substance, that nothing but fraud or intentional misstatements would avoid the policy, and that payment of the sum assured would be contested only in case of fraud. It was held that the statements would not be regarded as warranties, and that to sustain a defense to an action on the policy, the defendant must show, not only that the statements were untrue, but that they were known by the insured so to be, and that they were made intentionally and with a fraudulent design.

[35] Holbrook v. St. Paul F. etc. Ins. Co., 25 Minn. 229.

[36] Schwarzbach v. Ohio Valley Prot. Union, 25 W. Va. 622.

[37] Campbell v. New England etc. Ins. Co., 98 Mass. 381.

It is also held that within the above class of cases are those where it may be clearly implied from the language used that the parties intended to stipulate that the statements should not be deemed warranties. Thus, an agreement that the application contains a full and true exposition of the facts as to the situation, value, and risk of the property, so far as known to the assured, must be construed in favor of a representation.[38] So statements may be qualified by the stipulation "to the best of his knowledge and belief," [39] or by the statement that the answers made a part of the contract are "as nearly correct as the assurer could remember." [40] So an express warranty may be qualified by the words of the application, "material to the risk," so as to make the statements so far representations as to necessitate their being "material" to avoid the policy.[41] And the warranty is qualified so as to apply only to the risk and value where the words are used "the foregoing is a correct description, correct as to risk and value." [42] So also where the words used are, "we believe the above particulars and statements are true," since the whole construed together shows the intent to make the statements representations and not warranties.[43] Statements in an application not required by the policy are representations when not descriptive of the property, even though the application is expressly referred to in the policy as a part thereof.[44] So a fact, quality, or circumstance specified in the policy may relate to the risk, or may be used for the purpose of identifying the subject matter. In the former case it will be a warranty.[45] But if facts are stated merely by way of recital or

[38] Fisher v. Crescent Ins. Co., 33 Fed. Rep. 549 (annotated case). See, also, Mulvelle v. Adams, 19 Fed. Rep. 887; Redman v. Hartford F. Ins. Co., 47 Wis. 89; Wilkins v. Germania F. Ins. Co., 57 Iowa, 529.

[39] Clapp v. Massachusetts etc. Co., 146 Mass. 519; 16 N. E. Rep. 433; Washington etc. Ins. Co. v. Harvey, 10 Kan. 525.

[40] Ætna L. Ins. Co. v. France, 4 Otto (94 U. S.), 561.

[41] Waterbury v. Dakota F. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697.

[42] Lindsay v. Union Mut. F. Ins. Co., 3 R. I. 157.

[43] Wheelton v. Hardesty, 27 L. J. Q. B. 241; 5 Jur., N. S., 14.

[44] Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452.

[45] Wood v. Hartford F. Ins. Co., 13 Conn. 533.

mere description, or for the purpose of identifying the subject matter, and do not relate to the risk, they are representations.[46] So a statement as to occupancy may be only by way of description, and not a continuing warranty.[47] And where a policy is upon four ice-boats to be towed by a certain steamer or some other good boat equal thereto, there is no implied warranty that the tow-boat is of sufficient capacity to manage the four ice-boats.[48] Statements of belief or expectation or information, though in writing in the policy, are representations merely. A representation of an expectation is not the same as the positive representation of an existing fact, and even though the latter might be in the nature of a warranty, the former does not become a warranty.[49] So the words in the margin of the policy that the ship was "expected to sail" on a specified date, made in good faith, amounts only to a representation of the belief or expectation of the assured, and not a warranty that she will sail on the date named.[50] So representations as to age and value of buildings made on an application, even though declared to be warranties, are mere expressions of opinion,[51] especially where the building is worth more than double the amount insured and the mistake could not in any way affect the risk.[52] Within the class of cases properly to be noted under this section are those contracts wherein the question arises whether a stipulation is a representation or a warranty. The determination of this point, however, rests upon the intention of the parties, the presumption, however, being in favor of construing stipulations as

[46] Schultz v. Merchants' Ins. Co., 57 Mo. 331.

[47] Burlington Ins. Co. v. Brockway, 138 Ill. 644; 28 N. E. Rep. 799.

[48] Merchants' Ins. Co. v. Alger, 31 Pa. St. 446.

[49] Hernets v. Union Mut. F. Ins. Co., 48 Me. 558; 77 Am. Dec. 244.

[50] Rice v. New England Ins. Co., 4 Pick. (Mass.) 439. See Baxter v. New England Ins. Co., 3 Mason (C. C.), 96; and see as to marginal reference, Kenyon v. Berthon, Doug. 12, n. 4; Wood v. Hartford Ins. Co., 13 Conn. 533; 35 Am. Dec. 92; Co-operative Assn. v. Leflove, 53 Miss. 1.

[51] Phœnix Ins. Co. v. Wilson (Ind.), 25 N. E. Rep. 592; 20 Ins. L. J. 73; Eddy v. Hawkeye Ins. Co. (Iowa), 30 N. W. Rep. 808. But see German Ins. Co. v. Gibson, 53 Ark. 494; 14 S. W. Rep. 672.

[52] Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808.

representations, in cases of doubt. But if the words used show a clear purpose to make the statements of the assured of the same force as warranties, or in effect warranties, then courts must be governed by the contract which the parties have made for themselves, otherwise if there is room for construction the stipulation will not be held to bind the assured by the rigid rules of a warranty.[53]

§ 1891. When Statements in Application are Representations—Reference to Application—Generally.[54]—The general rule is that a statement in an application is a representation, rather than a warranty, unless made a warranty by express terms or otherwise so clearly referred to as to become a part thereof.[55] If the policy contains no warranty of the truth of the statements in the application, and the latter is not made a part of the policy, the statements, or some of them, must be both material and untrue to defeat a recovery.[56] So in the case of benefit certificates if the entire contract is contained therein, and they do not mention nor refer to the applicant's answers to questions, such answers are representations and not warranties, and are no part of the contract,[57] and the representations must not only be made a part of the contract, but must clearly appear from the entire contract to be deemed strict conditions, upon the literal truth or fulfillment of which the contract rests.[58] Nor is an application for insurance describing a building a warranty, unless inserted in the policy or clearly made a part thereof, and a mere general reference in

[53] Wood v. Hartford Ins. Co., 13 Conn. 544.

[54] As to when statements in application are warranties, see next chapter.

[55] Daniels v. Hudson River etc. Ins. Co., 12 Cush. (Mass.) 416; Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36; Wilson v. Conway F. Ins. Co., 4 R. I. 141; Presbyterian Assur. Fund v. Allen, 106 Ind. 593; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507; 2 Pet. (U. S.) 47; Bradman v. New Hampshire Mut. F. Ins. Co., 20 N. H. 551.

[56] Fidelity & Casualty Co. v. Alpert, 14 U. S. C. C. A. 474; 67 Fed. Rep. 460.

[57] McVey v. Grand Lodge A. O. U. W., 53 N. J. L. 17; 20 Atl. Rep. 873. See sec. 1887, herein.

[58] Vivar v. Supreme Lodge K. of P. (N. Y.), 20 Atl. Rep. 36.

the policy to the application is not sufficient to give it the effect of a warranty.[59] Again, a policy of life insurance provided that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue," the policy shall be void, and purported to be made by the insurers in consideration of the representations made to them in the application for the policy. It was held that the answers to the questions in the application were representations and not warranties, and that their untruth was matter of defense to be pleaded and proved by the insurer; but that such representations were made conclusively material by the terms of the policy.[60] Again, an application for a policy of life insurance contained an agreement that the answers and statements should "be the basis and form part of the contract or policy, and if the same be not in all respects true and correctly stated, the said policy shall be void according to the terms thereof." The policy declared that the insurance was "in consideration of the representations," etc., and that fraud and intentional misrepresentations vitiated the policy, but did not otherwise refer to the application. It was held that the agreement and statements in the application did not become a part of the policy and were not warranties, and that the policy was avoided only for fraud or intentional misrepresentations.[61]

§ 1892. Test of Materiality of Representation.—It is said that a misrepresentation must be of a fact material to the risk.[62] While it is true that a misrepresentation will avoid the policy if it is of a fact actually material to the risk, it is not true that it must be material to the risk as such in all cases. It need not actually have any bearing upon the state or condition of the subject matter. The rule already given as to what constitutes a material fact in cases of concealment is generally

[59] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567.

[60] Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; 10 Am. Rep. 166.

[61] American Popular L. Ins. Co. v. Day, 39 N. J. 89; 23 Am. Rep. 198.

[62] Battles v. York Co. Mut. F. Ins. Co., 41 Me. 208.

applicable here. The question is, Did the fact or circumstance represented or misrepresented operate to induce the insurer to accept the risk or to accept it at a less premium? If it offers a false inducement which is acted upon in either case, the insurer being misled or deceived, the representation is material. And this is so if the truth would have disclosed a fact increasing or materially changing the risk as understood and agreed upon to be taken, or if, had the truth been known, the insurer would have materially modified the terms of the contract, or have rejected the risk or charged a higher premium, or if the representation was calculated to mislead and does mislead; it being assumed, however, that the insurer is governed by the rules governing prudent and intelligent underwriters in practice in like cases.[63] So where the assured knows that the application is to be forwarded to the company, and that the description of the property therein is by the terms thereof to be the basis on which the risk will be accepted or rejected, such statements are material, and must not be essentially untrue.[64] If the facts and attendant circumstances show that the representations could not have induced the acceptance of the risk at all, nor have influenced the rate of premium, it is not material.[65] If the assured was in apprehen-

[63] Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697; Bobbitt v. Liverpool etc. Ins. Co., 66 N. C. 70; Commonwealth v. Morninger, 18 Ind. 352; Vanderworst v. Smith, 2 Caines (N. Y.), 155, per Thompson, J.; Himely v. South Carolina Ins. Co., 1 Mill's Const. 153; 12 Am. Dec. 623; Clason v. Smith, 3 Wash. (C. C.) 156; Quinn v. National Assur. Co., 1 Jones & C. 316; Nicoll v. American Ins. Co., 3 Wood. & M. (C. C.) 529; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567; Libald v. Hill, 2 Dow, 263; Mutual B. L. Ins. Co. v. Miller, 39 Md. 475; Murfatroyd v. Crawford, 3 Dall. (U. S.) 491; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; Millville v. Adams, 19 Fed. Rep. 887; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; Ingraham v. South Carolina Ins. Co., 3 Brev. (S. C.) 522; Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568; Holloman v. Life Ins. Co., 1 Wood (C. C.), 674; Schweder v. Stock etc. Ins. Co., 46 Mo. 174. The materiality and truth of statements in an application not made part of the policy is for the jury: Fidelity & Casualty Co. v. Alpert, 14 U. S. C. C. A. 474; 67 Fed. Rep. 460.

[64] Bartholomew v. Merchants' Ins. Co., 25 Iowa, 507.

[65] Clason v. Smith, 3 Wash. (C. C.) 156. "The materiality of the representation is determined by the same rule as the materiality of a concealment": Deering's Annot. Civ. Code Cal., sec. 2581.

sion of incendiarism and falsely states to the contrary, he cannot recover.[66] A misrepresentation as to the time the vessel is out on her voyage is not material, provided the actual time she has been out is within the usual time of her voyage.[67] A recital that certain parties are insured on account of other named parties is not a representation of ownership of the vessel insured.[68] So a representation that imports that the vessel is seaworthy is immaterial, as seaworthiness of a vessel is impliedly warranted in marine risks.[69] But if such a fact is in answer to inquiries by the insurer, it would be otherwise. And a representation as to where the ship was at the date of the commencement of a time policy is immaterial, because the true commencement and termination of the risk are the termini fixed by the policy.[70] So where the risk was refused upon the ground that the beneficiary was the first cousin of the applicant, but thereafter the applicant wrote to the company that the beneficiary was a creditor and his friend, dependent upon him for support, which statement was false in part, but was not a material inducement to issuing the policy, it was held that in view of the fact that the statements in the application were made warranties, that the letter was not a part of the application, but was admissible to show fraud, although it was not a statement the falsity of which would render the policy void, and it was immaterial whether the applicant authorized writing and sending the letter or not.[71] A representation that adjoining land is vacant is immaterial.[72] So a representation that the building was finished, made at the time of obtaining consent to other insurance, is immaterial.[73] An oral representation made to the company's agent but never communicated to the company, and which did not induce the

[66] Whittle v. Farmville Ins. etc. Co., 3 Hughes (C. C.), 421.

[67] Mackay v. Rhinelander, 1 Johns. Cas. (N. Y.) 408.

[68] Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595.

[69] Augusta Ins. etc. Co. v. Abbott, 12 Md. 348.

[70] Vigneaux v. Lime Rock Ins. Co., 59 Me. 457; citing Manly v. United M. & F. Ins. Co., 9 Mass. 85; Martin v. Fishing Ins. Co., 20 Pick. (Mass.) 389.

[71] Mace v. Provident L. Ins. Assn., 101 N. C. 122; 7 S. E. Rep. 674.

[72] Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 632.

[73] Williams v. New England Mut. F. Ins. Co., 31 Me. 219.

risk or have any influence upon the company, is not material.[74] Further illustration will appear under the subsequent sections in this chapter.

§ 1893. Representation Only Relates to Material Facts Except it be Otherwise Stipulated.—Within the limits of the rule above stated, unless it is otherwise stipulated, a representation is a statement of or relating to facts actually material; or which concern the risk or to a fact intended to be made material,[75] or the representation must be made under such circumstances as to be deemed material by the underwriter.[76] In the absence of fraud the materiality of mere verbal representations is the controlling element in determining their effect, and if immaterial, the contract cannot be affected, even though the policy stipulates that representations in the application avoid the policy if untrue in any respect.[77] A representation need only be true as to matters material to the risk, and this distinguishes it from a warranty.[78]

§ 1894. False Representations in Regard to Material Matters avoid Contract.—A false representation in regard to material matters within the rule as to what constitutes

[74] Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. St. 293.

[75] Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 467; Nicoll v. American Ins. Co., 3 Wood. & M. (C. C.) 529; Buford v. New York L. Ins. Co., 5 Or. 334; Boardman v. New Hampshire F. Ins. Co., 20 N. H. 551; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36; Maryland Ins. Co. v. Rudens' Admr., 6 Cranch (U. S.), 338; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; 77 Am. Dec. 721; Elkins v. Jansen, 13 B. & W. 655. A misrepresentation must be "of a matter material to the risk, either designed or otherwise": Hammond on Fire Insurance, ed. 1840, 89, citing Farmers' Ins. etc. Co. v. Snyder, 16 Wend. (N. Y.) 480, 488. A false representation must be of a fact actually material to the risk, or one clearly so intended by the agreement of the parties in order to vitiate the policy: Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405.

[76] Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36.

[77] Higbee v. Guardian Mut. L. Ins. Co., 53 N. Y. 603.

[78] Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488; 22 Am. Dec. 539; Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; Waterbury v. Dakota F. &. M. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697.

a material fact above given, will avoid the contract,[79] even though not embraced in the contract, and therefore not a part thereof.[80] Under the California code "a representation is to be deemed false where the facts fail to correspond with its assertions and stipulations."[81] Where any of the material representations in a fire policy are false, the insurer's tender of the premium and notice that the policy is canceled before the commencement of suit thereon operate to rescind the contract of insurance.[82]

§ 1895. Misrepresentations or False Representations must be of Material Facts.—As a general rule misrepresentations will not, in the absence of stipulations to the contrary, avoid the policy, unless they relate to material facts.[83] So it is held that a representation must not only be false, but

[79] Babbitt v. Liverpool etc. Ins. Co., 66 N. C. 70; 8 Am. Dec. 494; Ely v. Hallett, 2 Caines (N. Y.), 57; Hoffman v. Legion of Honor (U. S. C. C. Va. 1888), 35 Fed. Rep. 252; Lewis v. Eagle Ins. Co., 10 Gray (Mass.), 508; Frusworth v. Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; Prudhomme v. Salamander F. Ins. Co., 27 La. Ann. 695; Archer v. Metropolitan L. Ins. Co., 13 Phila. (Pa.) 139; Bufe v. Turner, 6 Taunt. 338; 2 Marsh. 46; McVey v. Grand Lodge A. O. U. W., 53 N. J. L. 17; 20 Atl. Rep. 873; Wainwright v. Bland, 1 Moody & R. 481; 1 Mees. & W. 32; 6 Tyrw. 417; Anderson v. Thornton, 8 Exch. 425; Darby v. Newton, 6 Taunt. 544; 2 Marsh. 252; Louisiana Mut. Ins. Co. v. New Orleans Ins. Co., 13 La. Ann. 246.

[80] McVey v. Grand Lodge A. O. U. W., 53 N. J. 17; 20 Atl. Rep. 873.

[81] Deering's Annot. Civ. Code Cal., sec. 2579. And if a representation is false in a material point, the injured party may rescind from the time it becomes false: Deering's Annot. Civ. Code Cal., sec. 2580.

[82] Rankin v. Amazon Ins. Co., 89 Cal. 203; 23 Am. St. Rep. 460.

[83] Clason v. Smith, 3 Wash. (C. C.) 156; Bellaty v. Thomaston Ins. Co., 61 Me. 414; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Stetson v. Massachusetts Ins. Co., 4 Mass. 330; Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697; Schroeder v. Stock etc. Ins. Co., 46 Mo. 174; Dewees v. Manhattan Ins. Co., 34 N. J. 244; Boardman v. New Hampshire Mut. B. F. Ins. Co., 20 N. H. 551; Cushman v. United States L. Ins. Co., 4 Hun (N. Y.), 783; Kirty v. Smith, 1 Barn. & Ald. 672; Mackay v. Rhinelander, 1 Johns. Cas. (N. Y.) 408; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Aicher v. Metropolitan L. Ins. Co., 13 Phila (Pa.) 139; Hodgson v. Marine Ins. Co., 5 Cranch (U. S.), 100; Alsop v. Insurance Co., 1 Sum (C. C.), 458; Holloman v. Life Ins. Co., 1 Wood (C. C.), 674; Mosley v. Vermont Mut. F. Ins. Co., 55 Vt. 142.

must be material to avoid the policy,[84] and also that its known falsity will not vitiate the contract unless the representation was material, or deemed so by the insurer;[85] and it is also held that representations must be materially different from the truth in a way that increases the risk, in order to avoid the contract.[86] Unintentional misstatements by an assured will not be treated as a breach of warranty rendering his policy void when the policy itself declares that "fraud, false swearing, misstatement, or concealment of a material fact by the assured shall render this policy void."[87]

§ 1896. Same Subject—Where Statement is Intentionally False—Effect of the Fraud as to Materiality of Fact to Risk.—If the representation is calculated to mislead or deceive, it is material.[88] So also where it is intentionally false and calculated to mislead the insurers into issuing the policy, and is material, the policy is avoided.[89] And while an intentionally false statement presents a case of actual fraud, and might seemingly constitute an exception to the rule last stated,[90] nevertheless it is within the rule, for it comes within the test of materiality already stated.[91] So that it may be given as a general rule that if the representation is intentionally false, the conclusion is necessitated that the purpose was to mislead or deceive the insurer, and thereby induce him to take the risk, and in such case the presumption fairly arises that the underwriter was so induced, and the fraud will vitiate the contract. But the distinction exists between this and cases within the rule noted under the last section, namely, that although an intentionally false representation by fraudulently inducing the risk is made material, yet an inquiry into its ac-

[84] Clason v. Smith, 3 Wash. (C. C.) 156.

[85] Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36.

[86] Nicoll v. American Ins. Co., 3 Wood. & M. (C. C.) 529.

[87] National Bank v. Union Ins. Co., 88 Cal. 497; 22 Am. St. Rep. 324.

[88] Bobbitt v. Liverpool etc. Ins. Co., 66 N. C. 70.

[89] McVey v. Grand Lodge A. O. U. W., 53 N. J. L. 17; 20 Atl. Rep. 873.

[90] Section 1895, herein.

[91] Section 1892, herein.

tual materiality to the risk is precluded by the intentional fraud when the same is not denied and clearly proven.[92] Thus, it is held that the assurer must prove either that the representation was untrue or fraudulent.[93] But to preclude an inquiry into the materiality to the risk of the fact intentionally misrepresented, the fraud of the assured and his intent to mislead and deceive should be clearly and satisfactorily established, for the law will not presume fraud; the burden is upon the affirmative.[94] But fraud may in other contracts be established by circumstances from which fraud may be inferred, as well as by direct and positive proof, and the rule would no doubt cover insurance contracts;[95] and in cases where upon the proof there is a doubt as to the fraudulent intent, then evidence is admissible of the immateriality of the facts misrepresented.[96] Mr. Parsons, however, raises a question whether even in cases of actual fraud it would not be proper to admit evidence that the insurers were wholly uninfluenced by the intentional falsehood.[97] We would suggest that the fraud con-

[92] 2 Duer on Marine Insurance, ed. 1846, 691-93; Pawson v. Watson, Cowp. 787; 3 Kent's Commentaries, 5th ed., 283; Roberts v. Fonnereau, Park on Insurance, 176; Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13.

[93] Cushman v. United States L. Ins. Co., 4 Hun (N. Y.), 783.

[94] Pine v. Vanuxem, 3 Yeates (Pa.), 30. "As fraud is never presumed, an underwriter who would impute fraud to the insured must be prepared to prove it by evidence according to the maxim, Incumbit sans probandi ei qui dicit": 1 Marshall on Insurance, ed. 1810, *466. See Ionides v. Pender, 9 L. R. Q. B. 531; 43 L. J. Q. B. 227; Livingston v. Delafield, 3 Caines (N. Y.), 49; 1 Johns. (N. Y.) 522; Williams v. Delafield, 2 Caines (N. Y.), 329. See as to proof of fraud in other contracts, McCreary v. Skinner, 75 Iowa, 411; 39 N. W. Rep. 674 (annotated case); Adams v. Schuffer, 11 Colo. 15; 17 Pac. Rep. 21; Beatty v. Fishel, 100 Mass. 448; Waddingham v. Loker, 44 Mo. 132; note to 65 Am. Dec. 157-64; Strauss v. Kranert, 56 Ill. 254; Gilliam v. Alford, 69 Tex. 267; 6 S. W. Rep. 757; Warren v. Gabriel, 51 Ala. 235; Hopkins v. Lievert, 58 Mo. 201; Moses v. Katzenberger, 84 Ala. 95; 4 S. Rep. 237; Marksbury v. Taylor, 10 Bush (Ky.), 519; Sweeney v. Devens, 72 Mich. 301; 40 N. W. Rep. 454; Smith v. Webb, 64 N. C. 541; Riley v. Nielquist, 23 Neb. 474; 36 N. W. Rep. 657.

[95] See cases in last note; Robinson v. Lord Vernon, 7 Com. B., N. S., 231; Craig's Appeal, 77 Pa. St. 448.

[96] 2 Duer on Marine Insurance, ed. 1846, 693.

[97] 1 Parsons on Marine Insurance, ed. 1868, 416, et seq., and notes.

sists not alone in the intent to mislead or deceive, but also upon the presumption that the insurer was induced thereby to assume the risk or lower the rate of premium. So that upon the question whether intentional fraud actually exists, it ought to be proper and relevant to the issue to show as an actual fact, or from such surrounding facts and circumstances as may be admissible, that the assurer was wholly uninfluenced by the intentional falsehood, or that it was of a character which could not have possibly influenced his judgment.[98] It is a rule in other contracts that a fraud which vitiates a contract does not consist alone of the intent, but in the intent coupled with the fact that the matter in question related to and was of the essence or substance thereof; or that it actually misled or deceived the other party to his injury; or that it induced the act or omission of the other party. If the agreement would not have been completed had the fraud not been practiced, then it is material; but if it appears or is reasonably probable that the contract or act done would have been completed upon the same terms or done in the same way, then it is not material.[99] Under the code of California, in case a representation in a contract of marine insurance is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract.[100]

[98] See Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455; 20 Atl. Rep. 36; Libald v. Hill, 2 Dow, 263; Commonwealth Ins. Co. v. Monninger, 18 Ind. 352; Cushman v. United States L. Ins. Co., 4 Hun (N. Y.), 783.

[99] Moses v. Katzenberger, 84 Ala. 95; 4 S. Rep. 237 (annotated case); Southern Devel. Co. of Nevada v. Silva, 8 Sup. Ct. Rep. 881; McAleer v. Horsey, 35 Md. 339; Hagee v. Grosman, 31 Ind. 223; Elder v. Allison, 45 Ga. 13; Laidlaw v. Organ, 2 Wheat. (U. S.) 178; Clark v. Everhart, 63 Pa. St. 374; Brown v. Cody, 115 Ind. 484; 18 N. E. Rep. 9 (annotated case); Still v. Little, 63 N. Y. (18 Sick.) 427; Banque Franco-Egyptienne v. Brown, 34 Fed. Rep. 162; Clapham v. Shillets, 7 Beav. 149; Hazard v. Irwin, 18 Pick. (Mass.) 95; Chatham v. Jones, 69 Tex. 744; 7 S. W. Rep. 600; Frenzel v. Miller, 37 Ind. 3; 10 Am. Rep. 62; Tiboel v. Saunders Co. Nat. Bank, 24 Neb. 815; 40 N. W. Rep. 415 (annotated case); Byard v. Holmes, 34 N. J. L. 296; Babcock v. Case, 61 Pa. St. 427; Mohler v. Carder, 73 Iowa, 582; 35 N. W. Rep. 647 (annotated case), case where rescission was sought in equity.

[100] Deering's Annot. Civ. Code Cal., sec. 2676.

§ **1897. Where Positive Representation is False and Material Fraud need not be Proven.**—In cases where the misrepresentation is positive and of a fact actually material, it is not necessary to prove that the representation was fraudulently made; the materiality of the misrepresentation, and its proven falsity does away with the necessity of showing actual fraud.[101] So in case of a policy of fidelity guarantee insurance, false representations which induced the contract were made as to the amount of moneys intrusted to the care of the party whose fidelity was guaranteed, and also as to the length of time moneys paid into his hands were retained and the frequency of accounting, and the falsity of the representations were held to avoid the insurance.[102] And positive representations as to the time of the ship's sailing will, if the fact is material to the risk, avoid the policy if false,[103] and a positive statement that the ship was seen safe at a certain place on a specified date, when she was in fact lost at the time, the representation being found material by the jury, will avoid the policy.[104] In an early English case, however, it is held that where the contract is in writing, the misrepresentation must have been fraudulent, otherwise evidence thereof is inadmissible. The case was a representation of a future fact.[105] But in a Massachusetts case the representation was positive. The policy stipulated for forfeiture for misrepresentation of material facts. The court charged the jury that the representations were material, and if falsely and fraudulently made and relied on, the contract was vitiated. In response to a request by the

[101] Anderson v. Thornton, 8 Exch. 425; Lewis v. Eagle Ins. Co., 10 Gray (Mass.), 508; Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; Archer v. Metropolitan L. Ins. Co., 13 Phila. (Pa.) 139; Bobbett v. Liverpool etc. Ins. Co., 66 N. C. 70; 8 Am. Rep. 494; Hoffman v. Legion of Honor (U. S. C. C. Va. 1888) 35 Fed. Rep. 252.

[102] Towle v. National Guardian Assur. Soc., 30 L. J. Ch. 900.

[103] Fillis v. Brutton, reported in 1 Marshall on Insurance, ed. 1810, *467.

[104] Macdowall v. Fraser, Doug. 260.

[105] Flinn v. Tobin, 1 Moody & M. 367. See Edwards v. Footner, 1 Camp. 530; Steel v. Lacy, 3 Taunt. 285; Bryant v. Ocean Ins. Co., 22 Pick. 200, 205; Whitney v. Haven, 13 Mass. 172.

insurer the court further instructed the jury that if the insurer in fact relied upon the statements, and they were in fact untrue, there could be no recovery, even if the insured believed them true, and the court added, "provided these statements were false and fraudulent," and it was held that the plaintiff had no grounds for exception.[106] If it is sought to avoid the contract by the fact that false representations as to material points were made at the time the policy was applied for, it is not necessary for the insurers to show that the representations were moral falsehoods; it is sufficient to prove that they were in point of fact untrue.[107]

§ **1898. Representation may be of Facts actually Material to the Risk—Question for Jury.**—A representation may be of a fact actually material to the risk which the assurer is asked to assume,[108] and whether it is so material is a question for the jury.[109]

§ **1899. Representations may be of Facts in no Way Material to the Risk.**—The representation may be misrepresentation of a fact in no way material to the risk, and which does not relate to the state or condition of the property, to the ship or to the nature of the voyage, and yet be made under such circumstances and in such a way as is calculated to and does gain the confidence of the assurer, and induces him to accept the risk or to fix a certain rate of premium. Thus, where the insured represented that he was the moneyed man of the concern, which was a fraudulent representation, and thereby

[106] Wood v. Fireman's Ins. Co., 126 Mass. 316. The facts were these: An application for a fire policy stated that the copy was of a painting, the original of which was in the Vatican, or one of the churches at Rome. That it was by Leonardo de Vinci, and could not be purchased for one million dollars. That no other copy existed in America, and the Pope would never allow another copy to be made.

[107] Mutual etc. Ins. Co. v. Wise, 34 Md. 582.

[108] Sheldon v. Hartford F. Ins. Co., 22 Conn. 235; Ely v. Hallett, 2 Caines (N. Y.), 57; Darby v. Newton, 6 Taunt. 544; 2 Marsh. 252; Price v. Dupeau, 1 Brev. 452; Reid v. Harney, 4 Dow. 97.

[109] Flinn v. Headlam, 9 Barn. & C. 693; 7 L. J. K. B. 307.

induced the insurer to assume the risk, such a statement, even though not material to the risk, will avoid the policy.[110] And it is also held that a representation which is not material must not only be untrue, but willful to avoid the policy.[111]

§ 1900. Representation may be of Facts Intentionally False.—The representation may be of a fact which the assured intentionally and falsely states as true, with the purpose of misleading or deceiving the insurer into an acceptance of the risk, or an acceptance thereof at a lower rate of premium, in which case it is material.[112]

§ 1901. Positive Statement of Fact which Assured does not Know to be True.—A representation may be the positive statement of some fact as true without the assured knowing it to be true, in which case, if it has a tendency to mislead or deceive, and if the underwriter is actually deceived thereby and so enters into the contract, the representation will be so far material as to avoid the contract.[113]

§ 1902. Representations through Mistake, Ignorance, or Negligence.—A representation of a fact may be false or untrue through mistake, ignorance, accident, or negligence, in which case if it induces the risk which the assurer would not otherwise have taken, it is material; so also where it induces acceptance of the risk at a lower rate of premium, actual fraud is not, in such case, a material factor. The ground of avoidance is that of legal or constructive fraud, and it is now well settled that in cases of the character above specified, the misrepresentation of a material fact preceding or contempo-

[110] Valton v. National L. Fund Assn., 20 N. Y. 32; 40 N. Y. (1 Keyes) 21; 22 Barb. 9; 17 Abb. Pr. 268; 4 Abb. Dec. 437. See, also, Libbald v. Hill, 2 Dowl. Pr. 63.

[111] Daniels v. Hudson River F. Ins. Co., 12 Cush. 416; 59 Am. Dec. 192.

[112] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; McVey v. Grand Lodge A. O. U. W., 53 N. J. L. 17; 20 Atl. Rep. 873. See sec. 1896, herein.

[113] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192; Macdowall v. Fraser, Doug. 260, per Lord Mansfield.

raneous with the contract avoids the policy, even though the assured be innocent of fraud or an intent to deceive, or to wrongfully induce the assurer to act, or whether the statement was made in ignorance or good faith, or unintentionally. A mere inadvertent omission of material facts which the insured should have known to be material will avoid the contract if false and relied on by the assurer.[114] And the rule is carried to the extent of holding that if the conduct or declarations of the insured induce the misapprehension of a material matter on the part of the insurer, in consequence of which he enters into a contract of insurance, he is entitled to be released, whether the act or declaration so inducing the act of the insurer was through fraud or innocent mistake.[115] So also will unintentional omissions have the same effect in a fire risk.[116] So a representation, though not intentionally false, that a vessel has arrived at her port of destination and is clear of her cargo, when in fact she is only just entering the harbor of that port, avoids a policy of insurance issued thereon.[117] So a material

[114] Dennistown v. Lillie, 3 Bligh. 202; Cornfoote v. Fowke, 6 Mees. & W., per Lord Abinger; Hutton v. Waterloo L. Ins. Co., 1 Fost. & F., 735; McDowell v. Frazer, Doug. 260; Steel v. Lacy, 3 Taunt. 281; Curell v. Mississippi etc. Ins. Co., 9 La. 163; 29 Am. Dec. 439; Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125; Wilber v. Bowditch Ins. Co., 10 Cush. (Mass.) 446; Stetson v. Massachusetts Ins. Co., 4 Mass. 330; Campbell v. New England Ins. Co., 98 Mass. 381; Traill v. Baring, 4 De Gex & S. 318; affirming 4 Giff. 485; 83 L. J. Ch. 521; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200; Haley v. Dorchester Mut. F. Ins. Co., 12 Gray (Mass.), 545, per J.; Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 540; Fiske v. New England Ins. Co., 15 Pick. (Mass.) 310; Archer v. Metropolitan L. Ins. Co., 13 Phila. (Pa.) 139; Feize v. Parkinson, 4 Taunt. 639; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; Elkin v. Jansen, 13 Mees. & W. 658, per Baron Parke; Farmers' Ins. Co. v. Snyder, 16 Wend. (N. Y.) 481; 30 Am. Dec. 118; Armour v. Transatlantic F. Ins. Co., 90 N. Y. 450; Fowler v. Ætna Ins. Co., 6 Cow. (N. Y.) 673; 16 Am. Dec. 460; New York Bowery Ins. Co. v. New York Ins. Co., 17 Wend. 359; Wright v. Hartford F. Ins. Co., 36 Wis. 522; Boutelle v. Westchester F. Ins. Co., 51 Vt. 4; 31 Am. Rep. 666; Hazard v. New England M. Ins. Co., 1 Sum. (C. C.) 211; 8 Pet. (U. S.) 557; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 185; Kohne v. Insurance Co. of North America, 1 Wash. (C. C.) 93, 158.

[115] Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; 18 Am. Rep. 681.

[116] Wright v. Hartford F. Ins. Co., 36 Wis. 522.

[117] Sawyer v. Coasters' Mut. Ins. Co., 6 Gray (Mass.), 221.

misrepresentation will avoid the policy even though honestly made, and if made by the assured's authorized agent, it will avoid the policy even though made without fraudulent intent on the part of the agent, and although the assured has no knowledge thereof.[118] But if the misrepresentation is immaterial, it will not avoid the contract. Thus, it was so held in case of an immaterial description of the property;[119] unless in addition to being untrue it is willful,[120] and induced the insurer to act either in fact or presumptively so, the presumption not being rebutted.[121]

§ **1903. Cases Qualifying the Last Rule.**—It is held, however, that undesigned and unintentional misstatements will not avoid the policy,[122] unless willfully erroneous or grossly negligent,[123] or the assured had knowledge thereof. Thus, where one, as the agent of his reputed wife, represented to an insurance company that she was his wife, and effected an insurance upon his own life in her name as her agent, for her benefit, and the truth of the case was that the marriage was void, by reason of the reputed wife having a former lawful husband living at the time of the second marriage, it was held that the policy was not void by reason of the illegality of the last marriage, unless it further appeared that the said reputed husband and wife knew at the time that the policy was effected that at the time of their supposed marriage the lawful husband of the wife was living and the marriage was illegal, and that they failed to inform the company of the fact.[124] So where the assured made a fair and honest statement of all that was required, his merely erroneous representations were held

[118] Armour v. Transatlantic F. Ins. Co., 90 N. Y. 450.

[119] Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; 18 Am. Dec. 681.

[120] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416; 59 Am. Dec. 192.

[121] See sec. 1896, herein.

[122] Miller v. Mutual etc. Ins. Co., 31 Iowa, 216. But see Wright v. Hartford F. Ins. Co., 36 Wis. 522.

[123] Fisher v. Crescent Ins. Co. (U. S. C. C. N. C. 1887, 1888), 33 Fed. Rep. 544, 549 (annotated case).

[124] Equitable etc. Assur. Soc. v. Paterson, 41 Ga. 338.

not to avoid the policy; so also of merely inaccurate representations honestly believed by the insured to be true.[125] In the chapter on concealment an analogous question is fully considered, and what is said there would have some application here.[126]

§ **1904. Representations, Expectation, Belief, or Opinion, without Fraud.**—A representation, instead of being a positive statement of fact, may be only of the expectation, intention, belief, or opinion of the assured, in which case it is immaterial, in the sense that although false, it will not avoid the policy, provided there is no actual fraud in inducing the acceptance of the risk or its acceptance at a lower rate of premium. And even though the representation be material to the risk, if the statement amounts only to an expectation or belief that certain facts do or will exist, or that they will happen in a certain way, the insurer is not bound to rely upon such belief or expectation of the assured, but is obligated to make further inquiry before relying thereon. But there is a clear distinction between a case of this character and one where the assured intentionally and fraudulently states that, as a matter of expectation or belief, which he then knows to be actually untrue, or which the facts within his knowledge show to him that it is impossible that the matter stated by him as one of belief or expectation could exist or happen. Here the intent to deceive the insurer is apparent and there is actual fraud, and the fraud vitiates the contract where the insurer is misled or deceived in acting to his injury when he otherwise would not have so acted, and the rule applies where the statement appears from all the surrounding circumstances to have been one merely of expectation or belief, even though the exact terms thereof would seem to carry the force of a positive statement of a material fact, for no matter what the actual form of expression, yet if it is apparent that the underwriters were not

[125] Columbia Ins. Co. v. Cooper, 50 Pa. St. 331; Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13. See sec. 1896, herein.

[126] See Harmon v. Protection Ins. Co., 2 Ohio St. 452. See secs. 1848, 1849, herein.

misled, but understood it to import nothing but a probable expectation or belief, the courts will give the words used the construction intended. But good faith of the insured must exist in all cases.[127] Thus, in case of a policy on goods, the representation that the ship "is about to sail or will sail soon," or of the day on which she is expected to sail, is immaterial.[128] So a representation that the assurance could be effected at a specified rate, when the surrounding facts and circumstances show that it was only an opinion, and ought not to have influenced the acceptance of the risk nor the rate of premium, and which is not actually fraudulent, is immaterial, and no defense to the insurers.[129] And the statement that "a cargo is ready for her, and she is sure to be an early ship," is a representation merely of expectation or belief, the vessel being in a foreign port.[130] So a statement of intention merely is not a binding representation, and in the absence of actual fraud will not avoid the contract. No positive duty is created; it is a promise that if nothing occurs to justify the change of intention it will be executed as declared.[131] So where the in-

[127] Whitney v. Haven, 13 Mass. 172; Herrick v. Union Mut. F. Ins. Co., 48 Me. 558; 77 Am. Dec. 244; Brine v. Featherstone, 4 Taunt. 867; Boutelle v. Westchester F. Ins. Co., 51 Vt. 4; 31 Am. Rep. 666; Rice v. New England M. Ins. Co., 4 Pick. (Mass.) 439; Allegre v. Maryland Ins. Co., 2 Gill. & J. 136; 20 Am. Dec. 424; Behrens v. Germania F. Ins. Co., 64 Iowa, 19; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 400; Hubbard v. Glover, 3 Camp. 313; Augusta Ins. etc. Co. v. Abbott, 12 Md. 348; Alston v. Michigan M. Ins. Co., 4 Hill (N. Y.), 330; Bowden v. Vaughan, 10 East, 415. "Neither party to a contract of insurance is bound to communicate, even on inquiry, information of his own judgment upon the matters in question": Deering's Annot. Civ. Code Cal., sec. 2570. "The eventual falsity of a representation does not, in the absence of fraud, avoid a contract of insurance": Deering's Annot. Civ. Code Cal., sec. 2677. See Pawson v. Watson, Cowp. 787, per Lord Mansfield.

[128] Augusta Ins. etc. Co. v. Abbott, 12 Md. 348; Rice v. New England M. Ins. Co., 4 Pick. (Mass.) 439; Bowden v. Vaughn, 10 East, 415; Barber v. Fletcher, 1 Doug. 305.

[129] Clason v. Smith, 3 Wash. C. C. 156.

[130] Hubbard v. Glover, 3 Camp. 312.

[131] "No representation of a party's expectation or belief, unless fraudulently made, will avoid a policy. Nor is there any distinction between a party's expectation and intention as to any matter relating to the voyage," per Wilde, J., in Bryant v. Ocean Ins. Co., 22

tegrity of a certain person was insured, and it was represented that his accounts would be examined every fortnight, it was held a mere representation of intention, and that a recovery could be had, although the loss was occasioned by neglect to examine said accounts as stated.[132] Representations as to the age and value of buildings are mere expressions of opinion, although by the terms of the policy all answers are declared to be warranties.[133] But where the representation was, "The 'Brilliant' will said from Nassau for Clyde on May 1st, a running ship," and she sailed April 23d, opportunity for convoy being offered, it was held not a representation of an expectation merely, but of a material fact necessary to be complied with.[134] So statements as to value and like kindred matters are matters of opinion, immaterial if not actually fraudulent.[135] While the representation of an expectation is not the same as the representation of an existing fact,[136] still in this connection the question of intention evidenced by the surrounding circumstances, the position of the parties, and other relevant matters must be considered, for if it appears that the representation is a positive assertion that a certain fact exists or event shall happen, then so far as it is actually and clearly a positive stipulation the rule above given does not apply.[137]

§ 1905. False Representations Owing to Fault, etc., of Agent. A life insurance policy may be avoided for false answers written by the agent of the insurance company,

Pick. (Mass.) 200. See Grant v. Ætna Ins. Co., 15 Moore P. C. 515; 2 Duer on Marine Insurance, ed. 1845, 707, sec. 40.

[132] Benham v. United Guarantee & L. Assur. Co., 7 Exch. 744; 21 L. J. Ex. 317.

[133] Phœnix Ins. Co. v. Wilson (Ind.), 20 Ins. L. J. 73; 25 N. E. Rep. 592. See Rogers v. Phœnix Ins. Co., 121 Ind. 570; 23 N. E. Rep. 498; Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238; Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808.

[134] Dennistown v. Lillie, 3 Bligh, 202.

[135] National Bank v. Ins. Co., 95 U. S. (5 Otto) 673; Wheaton v. North British etc. Ins. Co., 76 Cal. 415; 18 Pac. Rep. 758. See Titus v. Glen's Falls Ins. Co., 81 N. Y. 410.

[136] Herrick v. Union Mut. F. Ins. Co., 48 Me. 558; 77 Am. Dec. 244.

[137] See Alston v. Meech Mut. Assur. Co., 4 Hill (N. Y.), 330; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200.

after leaving the presence of the assured, in an application signed in blank, if the answers so written conform to those actually made by the applicant.[138] Where the defense is misrepresentations as to the value of a horse, and it appears that the plaintiff could neither read nor write, and the insurer's agent examined the horse, made every statement in the application, signed plaintiff's name to the statement, she affixing her mark, and then on the back indorsed a statement that the horse was worth the amount represented, it was held a case for the jury.[139] But a policy is not avoided by false representations in the application under a provision that the statements contained in the application are warranties, and if any of them are false the policy shall be void, when the false statements in the application are made by the agent of the insurance company without the knowledge and without any fraud or attempt to deceive or misrepresent on the part of the assured.[140]

§ 1906. Statements Founded on Information from Agent.—The representation may be founded on the advices or information from an agent of the assured, who sustains such relations to his principal that his representations are virtually and legally those of his principal, in which case the representation based upon such advices will be material to the same extent as if proceeding from the principal, even though the assured may himself be innocent. But if the character of the agency is such that the acts of the agent in making such statements cannot be held to be those of the assured, the rule does not apply, except within the limits stated under the next rule;[141] and we believe that the assured may in any case make

[138] Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 8 Am. St. Rep. 849.

[139] Smith v. Insurance Co., 173 Pa. St. 15.

[140] Continental Ins. Co. v. Pearce, 39 Kan. 396; 7 Am. St. Rep. 557; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486; 39 Am. St. Rep. 356.

[141] Dennistown v. Lillie, 3 Bligh, 202; Fitzherbert v. Mather, 1 Term Rep. 12, opinions of Lord Mansfield, and Willis, Ashurst, and Buller, JJ.; Ruggles v. General Interest Ins. Co., 4 Mason (C. C.), 75, per Story, J.; 12 Wheat. 409. In this case the agency of the master was held to have terminated at the time. See Cal. Code provisions noted in sec. 1908, herein.

known that the advices or information is received from the agent, and expressly qualify or limit their binding force. This question above considered is distinct from that relating to the concealment of material facts by an agent, where the assured acts in good faith and is innocent. Upon the point of the legal effect of such concealment the authorities are in conflict.

§ **1907. Positive Statements Founded on Information Derived from Others.**—The statement may be a positive representation founded on information derived from others, neither the source of the information nor the fact that it is derived from others being stated, in which case it will be material if it operates as an inducement to making the contract or in fixing the rate of premium.[142]

§ **1908. Statements not Positive Based on Information from Others.**—If the representation, although based upon the information of others, is not positive, but is made in good faith, without fraud, and the assured makes known that his information is derived from others and submits the same, he does not undertake for the truth of the facts, but only for the truth of the information.[143]

§ **1909. Positive Statement Defining Time of Commencement of Risk.**—The statement may be a positive representation, material in that it really defines the time when the assured's right to the protection of the insurance shall attach; as where the ship in a policy "at and from" was represented to be at a certain port on a certain day, in which case it would

[142] McDowell v. Frazer, Doug. 260.

[143] Tidmarsh v. Washington F. & Ins. Co., 4 Mason (C. C.), 439, per Story, J.; Williams v. Delafield, 2 Caines (N. Y.), 329. See note to last section. The California code provides that, "when a person insured has no personal knowledge of a fact, he may, nevertheless, repeat information which he has upon the subject, and which he believes to be true with the explanation that he does so on the information of others, or he may submit the information in its whole extent to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the assured whose duty it is to give the intelligence": Deering's Annot. Civ. Code Cal., sec. 2578.

be in the nature of a warranty that the ship was safe in port at the day named.[144]

§ 1910. Facts Actually Material but not Relied on by Insurer.—The misrepresentation may be of a fact actually material to the risk, but the circumstances may clearly evidence that the insurer did not rely upon it, but upon other matters, in forming his judgment, and it does not therefore operate as an inducement to enter into the contract or in fixing the rate of premium, in which case its falsity will not be fatal, for the circumstances make the fact immaterial.[145]

§ 1911. Matters of Description or Facts Relating to Property.—The representation may be matter merely of description or facts relating to the property insured; its occupancy, use, or interest of the insured therein. It is material if it induces the risk or affects the rate of premium.[146] But a representation is immaterial if it appears not to have been considered by either party as important,[147] and an immaterial description will not avoid the policy.[148] Although the description in the representation may differ very considerably from the actual state of the property insured, if such variation were not fraudulently intended, and did not in fact affect the rate of insurance or change the actual risk, the policy is not avoided.[149] So where the building insured was represented as a "one-story, shingle roof, box and frame building," and it was covered with clapboards instead of shingles, and was in reality constructed of logs cut and laid one upon another and had but a slight box-frame addition

[144] Kemble v. Bonne, 1 Caines (N. Y.), 75.

[145] Flinn v. Headlam, 9 Barn. & C. 693. See Commonwealth Ins. Co. v. Munninger, 18 Md. 352.

[146] Everett v. Continental Ins. Co., 21 Minn. 76; Jackson v. St. Paul F. & M. Ins. Co., 33 Hun. (N. Y.), 60; Bufe v. Turner, 6 Taunt. 338; 2 Marsh. 46; Hobby v. Dana, 17 Barb. (N. Y.) 111; Frisbie v. Fayette Mut. Ins. Co., 27 Pa. St. 325; Dolliver v. St. Joseph etc. Ins. Co., 131 Mass. 39; Howard etc. Ins. Co. v. Cormick, 24 Ill. 455.

[147] Boardman v. New Hampshire Mut. F. Ins. Co., 20 N. H. 551.

[148] Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268; 18 Am. Rep. 681; Howard v. Cormick, 24 Ill. 455.

[149] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567.

thereto, it was held that it must appear, in order to avoid the policy for a false representation, that the risk was increased by reason thereof, or that the insurer was thereby induced to accept the risk or to fix the rate of premium lower than he otherwise would have done had the actual facts been known.[150] Where the building was described as a "story and a half hard-finished frame boarding-house building," and the upper story was cloth finished, it was held merely a misrepresentation, but one which would avoid the contract.[151] So any misrepresentation of a material fact in describing the property avoids the contract,[152] and if in the description or designation of the buildings in which the goods insured are located there is misrepresentation of a material fact, the contract is vitiated.[153] The description of a building intended to be insured filed in the office of the company is not a warranty that the building shall correspond in all respects with it, but only in substantial respects.[154] So a misdescription of a building by a mistake of the surveyor, in stating that a stone partition running through the building extended to the level of the roof, when in fact it was several feet below that level, will not avoid a policy on a stock of goods described as contained in such building where the risk is not shown to have been materially increased.[155] And describing a building in an insurance policy as a five-story brick building, making no mention of a cellar under it, is not a misdescription, which will avoid the contract, though there is a cellar under the building.[156]

§ **1912. Facts Rendered Material by Stipulation.**—A representation may by express stipulation be made material, in the sense that an inquiry into its materiality is thereby pre-

[150] Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361; 28 N. E. Rep. 868.

[151] Jackson v. St. Paul F. & M. Ins. Co., 33 Hun. (N. Y.), 60, one judge dissenting.

[152] Bufe v. Turner, 6 Taunt. 338; 2 Marsh. 46.

[153] Prodhomme v. Salamander F. Ins. Co. of New Orleans, 27 La Ann. 695.

[154] Delonguemare v. Tradesmen's Ins. Co., 2 Hall (N. Y.), 589.

[155] Farmers' Ins. Co. v. Snyder, 16 Wend. 481; 30 Am. Dec. 118.

[156] Benedict v. Ocean Ins. Co., 31 N. Y. 389.

cluded, and the insured will be bound in such case, even though the fact be actually immaterial. The truth of the statements being generally made in such cases the basis of the contract, it is sufficient to show that they are actually untrue.[157] And while warranties are not to be created by construction, and such statements are not actually warranties, such stipulations are in the nature of and have the effect of warranties, and must be strictly complied with so far as they are expressly and in terms declared, for the parties have by their agreement made the facts to which they relate material,[158] or, as is said in a case in Mississippi, all stipulations and conditions contained in the body of an insurance policy are warranties, to the absolute truth of which the parties have pledged themselves by their agreement, which precludes any inquiry into their materiality, and any deviation from the truth thereof will defeat a recovery, and in this respect the same is true of statements contained in other papers or documents expressly referred to or otherwise clearly made a part thereof, and no distinction exists in this regard between insurance policies and other contracts.[159] It is held that if, taking the whole instrument together, it is obvious that insurance companies have made the strict and literal exactness of the answers to certain questions a condition of the contract of insurance and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured, for they have a legal right to say that they will determine for themselves what is or is not material to the risk, and will base their contract upon the answers of the insured to specific interrogatories.[160] So where a life

[157] Higbee v. Guardian Mut. L. Ins. Co., 53 N. Y. 603; Stensgaard v. St. Paul Real Estate Title Co., 50 Minn. 429; 52 N. W. Rep. 910; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; Pottsville Mut. F. Ins. Co. v. Horan, 89 Pa. St. 438; Cobb v. Covenant Mut. B. Assn., 153 Mass. 176; Duncan v. Sun Fire Ins. Co., 6 Wend. (N. Y.) 488; 22 Am. Dec. 539; Glutting v. Metropolitan L. Ins. Co. (N. J.), 11 Cent. Rep. 348.

[158] Alabama Gold L. Ins. Co. v. Garber, 77 Ala. 210; Philadelphia v. Phœnix Mut. L. Ins. Co., 17 Minn. 497.

[159] Co-operative Assn. v. Loflove, 53 Miss. 1.

[160] Tebbetts v. Hamilton Mut. Ins. Co., 1 Allen (Mass.), 305; 79 Am. Dec. 740.

policy stipulates that it shall be void if certain statements, upon the faith of which the agreement is made, are untrue in any respect, the representation is thereby made a part of the contract, and the statements become material so as to preclude an inquiry into their materiality or immateriality, leaving the only question of fact to be determined to be simply whether they are true or false, and if false the policy is vitiated.[161] A clause in an insurance policy that if any false or erroneous representations or concealment material to the risk are made by the applicant, the policy shall be null and void, will not render the policy absolutely void in case of such representations, but merely voidable at the election of the insurer.[162] If a fire insurance policy is conditioned to be void "in case of any misrepresentation whatever," any misrepresentation, whether material or not, will avoid it.[163]

§ 1913. Statement Limited as to its Effect by Assured.—A representation may be a statement of fact, the effect of which is expressly limited by the assured at the time of making the same. In such case the limitation will be in the nature of a stipulation by the assured, agreed upon by the assurer as to the effect of the representation. Thus, in a marine risk the refusal to warrant will show the intention of the assured not to be bound by other than what the representation imports of itself; as where the goods are represented neutral property, but is coupled with a refusal to warrant them neutral, in which case a sentence of condemnation of a foreign court will not be admitted to falsify the representation.[164]

[161] Day v. Mutual B. L. Ins. Co., 1 MacAr. 41; 29 Am. Rep. 565; Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475; Anderson v. Fitzgerald, 4 H. L. Cas. 484; 17 Jur. 995; Foot v. Ætna L. Ins. Co., 4 Daly (N. Y.), 285; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; Scanlan v. Sceals, 6 Ir. L. 367; reversing 5 Ir. L. 139. See s. c. 13 Ir. L. 71; Monk v. Union etc. Ins. Co., 6 Rob. (N. Y.) 455; Union Cent. L. Ins. Co. v. Cheever, 36 Ohio St. 201; 38 Am. Rep. 573; Campbell v. New England Ins. Co., 98 Mass. 381. See secs. 1848, 1849, herein.

[162] St. Paul F. & M. Ins. Co. v. Midecken, 6 Dak. 494; 43 N. W. Rep. 696.

[163] Graham v. Fireman's Ins. Co., 87 N. Y. 69; 41 Am. Rep. 349.

[164] Nonnen v. Kittlewell, 16 East, 176. See Von Tungeln v. Dubois, 2 Camp. 151.

§ **1914. Facts Stated in Answer to Inquiries.**—A matter which is not in itself material may be made material by a specific inquiry, and in such case a misrepresentation of the fact avoids the policy, as a general rule;[165] and it is not necessary to show that the fact was material to the risk,[166] for by making the inquiry, the fact inquired about is made material.[167] And this is true even though the fact be one concerning which it may be presumed that the assurer has knowledge, or one which he might otherwise have easily ascertained by the use of due and reasonable diligence, and although it be of a fact which the assured would not have been obligated to have disclosed had no inquiries been made.[168] In cases of the character we are now considering some difference exists between oral representations and those which are contained in the usual printed application, since in the latter class of cases either the application or the policy, or both, generally stipulate that the statements in the application are made the basis of the contract, or the application is by express reference or otherwise clearly made a part of the contract.[169] Although the

[165] Miller v. Mutual B. L. Ins. Co., 31 Iowa, 216; Ætna L. Ins. Co. v. France, 91 U. S. 47; Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; Wilson v. Conway Ins. Co., 4 R. I. 141; Bruman v. Security L. Ins. Co., 4 Daly (N. Y.), 296; Campbell v. New England Mut. Ins. Co., 98 Mass. 381; Jenkins v. Quincy Mut. F. Ins. Co., 7 Gray (Mass.), 508; Day v. Mutual B. L. Ins. Co., 1 MacAr. (C. C.) 41; Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; Jeffries v. Economical L. Ins. Co., 22 Wall. (U. S.) 47; Cuthbertson v. Insurance Co., 96 N. C. 480; Mutual B. L. Ins. Co. v. Wise, 34 Md. 582; Clark v. New England etc. Ins. Co., 6 Cush. (Mass.) 342; 53 Am. Dec. 44; Davenport v. New England etc. Ins. Co., 6 Cush. (Mass.) 342; Foot v. Ætna L. Ins. Co., 4 Daly (N. Y.), 285; Macdonald v. Law Union F. & L. Ins. Co., 9 L. R. Q. B. 328; 43 L. J. Q. B. 131; Mutual B. L. Ins. Co. v. Cannon, 48 Ind. 264.

[166] Jeffries v. Economical L. Ins. Co., 22 Wall. 47; Ætna L. Ins. Co. v. France, 91 U. S. 47.

[167] Miller v. Mutual B. L. Ins. Co., 31 Iowa, 216; Schwartzbach v. Protective Union, 25 W. Va. 622, 655; Fitch v. American Popular L. Ins. Co., 59 N. Y. 557, and cases cited first note under this section.

[168] See Mackintosh v. Marshall, 11 Mees. & W. 116; Jeffries v. Economical Mut. L. Ins. Co., 22 Wall. (U. S.) 47; Ætna L. Ins. Co. v. France, 91 U. S. 510.

[169] See Byers v. Farmers' Ins. Co., 35 Ohio St. 606; 35 Am. Rep. 603; Cobb v. Covenant Mut. B. Assn., 153 Mass. 176.

general rule is that above stated, yet, as we have seen under a prior chapter, many cases have upheld the doctrine that in life risks the statement that the applicant has never had any serious illness will be construed to mean that the applicant has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous, and also that where the state of the insured's health is good, and he is actually in a sound physical and mental condition at the time, and honestly believes that the answers relative to his health are true, the fact that he has had some slight disease, etc., will not necessarily render the policy void.[170] In Nevada, the court has seriously questioned whether an inquiry into the materiality of a statement in answer to a question is admissible, the assured having acted in good faith and the fact being clearly immaterial.[171] In certain cases a departure from the rule might be justified by the fact that the terms of the contract are such as to leave room for construction, in which case the familiar rule applies that courts are inclined to construe the contract in favor of the assured.[172] Thus, in construing the answers to the interrogatories in a printed application for fire insurance, although the proper meaning of the words used are to be first resorted to, yet the meaning attached by the applicant to them and clearly ascertainable from the connection in which he uses

[170] See Illinois Masons' B. Soc. v. Winthrop, 85 Ill. 537; Morrison v. Wisconsin O. F. M. L. Ins. Co., 59 Wis. 162; secs. 1848, 1849, herein.

[171] Gerhauser v. North British Ins. Co., 6 Nev. 15. See Hough v. City F. Ins. Co., 29 Conn. 10; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; Mallory v. Travelers' Ins. Co., 47 N. Y. 52; 7 Am. Rep. 416; Monitor v. American L. Ins. Co., 101 U. S. 708; 111 U. S. 335; Hoose v. Prescott Ins. Co., 84 Mich. 309; 47 N. W. Rep. 587; 11 L. R. Annot. 340; Virginia F. & M. Ins. Co. v. Kloeber, 31 Vt. 749; Lebanon Mut. Ins. Co. v. Losch, 109 Pa. St. 100; Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; reversing 2 N. Y. Sup. Ct. 247; Germania Ins. Co. v. Rudwig, 80 Ky. 223; Reddick v. Sangeen Mut. F. Ins. Co., 14 Ont. Rep. 506; Phœnix Ins. Co. v. Wilson (Ind.), 25 N. E. Rep. 592; 20 Ins. L. J. 73; Boardman v. New Hampshire Mut. L. Ins. Co., 20 N. H. 557; Wood v. Fireman's Ins. Co., 126 Mass. 316; Conover v. Massachusetts Mut. L. Ins. Co., 3 Dill. (C. C.) 217; Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; 30 N. W. Rep. 808.

[172] Alabama etc. Ins. Co. v. Johnson, 80 Ala. 467; 2 So. Rep. 125.

them is to prevail over their proper meaning.[173] So inaccuracies in the answers to such interrogatories caused by the ambiguity of the same, taken in connection with each other, are to be charged to the account of the insurers who prepared the applications.[174] In support of the rule above given it may be argued that in marine risks, where the rule of strict construction obtains in matters of representation, it is a reasonable presumption that the insurer, in asking a question upon a specific point, desires that information thereon as a material factor in enabling him to form his judgment as to whether he will assume the risk and at what premium, and it is equally reasonable to conceive that the insured must have so understood and answered the inquiry. In case of oral answers in other risks, the same presumption could fairly be held to exist. If the answer is made to printed interrogatories, no reason exists on that ground why the rule should be relaxed, and if the statement in the application is stipulated to be material, or if it is made a warranty, there is a still greater reason for the enforcement of the rule.[175] If, however, the contract be of that class so worded as to leave a loophole of escape to the insurer in any event, and such that the assured cannot safely answer, if he answer at all, then there might be a case of ambiguity warranting a construction against the insurer.[176] But what has been said upon the somewhat analogous question of concealment would perhaps have some bearing here, although the

[173] Wilson v. Hampden F. Ins. Co., 4 R. I. 159.

[174] Wilson v. Hampden F. Ins. Co., 4 R. I. 159. See Lebanon Mut. Ins. Co. v. Losch, 109 Pa. St. 100.

[175] In relation to a contract of this character the words of Lord Chancellor Cranworth are pertinent. He says: "Nothing can be more reasonable than that the parties entering into the contract should determine for themselves what they think to be material, and if they choose to do so, to stipulate that unless the assured shall answer a question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and this false answer will then avoid the policy": Anderson v. Fitzgerald, 4 H. of L. 513; quoted Thomas v. Weems, 9 L. R. App. Cas. 671. And see Wood v. Hartford Ins. Co., 13 Conn. 544.

[176] See Fitch v. American Popular L. Ins. Co., 59 N. Y. 557; reversing 2 N. Y. Sup. Ct. 247; Hampden F. Ins. Co., 4 R. I. 159.

case of a positive representation in answer to a specific interrogatory would present a distinguishable point.[177]

§ 1915. When the Stipulated Materiality of Statements is Qualified.—If the representation is made material by a stipulation in the policy, or even expressly warranted, but the answers are expressly qualified, or if from other express terms of the contract or of the application it appears that the answers or representations were not intended to have the force and effect of a warranty, or if from the words used it is doubtful if they were intended to be so construed, the court will not hold them to be strict warranties or strictly material as a matter of law. And in such cases the absolute truth of the representation is not required, and unless the statement is materially and substantially false, or actually fraudulent or grossly negligent, the company is not released from the contract, and the insurer must prove that as thus limited the representations are untrue.[178] So a statement in an application for insurance that it is a full statement of all the facts known to the applicant and material to the risk, so far qualifies and limits the effect of warranties as to render them representations merely.[179]

§ 1916. Statements under Statutory Provisions.—The Kentucky statute makes all statements in the application representations and not warranties, and also provides that no misrepresentation, unless material or fraudulent, shall vitiate the policy. And under this act it is held that the policy is not avoided either upon a representation or warranty which is not fraudulent or material.[180] This decision overrules an earlier

[177] See secs. 1848, 1849, herein.

[178] Fisher v. Crescent Ins. Co., 33 Fed. Rep. 549 (annotated case); Clapp v. Massachusetts B. Assn., 146 Mass. 519; 16 N. E. Rep. 433; Elliott v. Hamilton Mut. Ins. Co., 13 Gray (Mass.), 139; Redman v. Hartford F. Ins. Co., 47 Wis. 89; Ætna L. Ins. Co. v. France, 94 U. S. (4 Otto) 561; Washington etc. Ins. Co. v. Harvey, 10 Kan. 525; Wilkins v. Germania F. Ins. Co., 57 Iowa, 529. See illustrations in sec. 1890, herein.

[179] Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468; 43 N. W. Rep. 697.

[180] Germania Insurance Co. v. Rudwig, 80 Ky. 223. See Ky. Gen. Stat. 1887, p. 308.

decision in the same state, decided under the same statute, where the parties entered into a contract for insurance, providing that the statements in the application should be deemed part of the policy and warranties, and that any false representation should render the policy void, and it was held that the contract waived the benefit of the statute and was avoided by any untrue statement, although immaterial.[181] So that the provisions of the statute under the decision first noted are not waived by an agreement of the parties opposed to the terms of the statute. But in California it is held that if it appears from the whole policy that a statement was not intended as a warranty, the court will not so construe it, even though the Civil Code provides that a statement in a policy of a matter relating to the person or thing insured or to the risk as a fact is an express warranty thereof.[182] In the matter of waiver of statutory provisions by contract, if the enactment is mandatory or does not operate as a positive prohibition, or does not stipulate requirements in the nature of conditions precedent to acquiring certain rights, there would seem perhaps to be no good reason why it may not be waived by the use of apt and clearly expressed terms agreed upon as having that effect, although if the matter is doubtful, a question might arise whether the construction should not be such as to favor the insured. The cases, however, afford no certain rule for guidance. It will be observed that in both the Kentucky and California cases the decision favored a construction for the benefit of the assured.[183] In Missouri, under a statute which provides that misrepresentations in the application in life risks shall not be deemed material unless the facts misrepresented contributed to the death of the assured, it is held that such enactment becomes a part of every life policy made while the act is in force, and applies as well to representations fraudulently made as to those made in good faith.[184] Under the Massachusetts

[181] Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.), 312; 26 Am. Rep. 194.

[182] National Bank of D. O. Mills & Co. v. Union Ins. Co., 88 Cal. 497; 26 Pac. Rep. 509.

[183] See sec. 194, herein.

[184] Klostermann v. Germania L. Ins. Co., 6 Mo. App. 582. See

enactments which provide that misrepresentations which increase the risk of loss will defeat the policy though made without intent to deceive, and also that the policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the assured, it is error for the court to instruct the jury that it is for them to decide whether the alleged false representations are material to the risk and false in fact, and if so whether they were made innocently and by mistake.[185] In a later case in the same state it is held that if the statute provides that false answers in an application for insurance must, in order to avoid the policy, be made with intent to deceive, unless they increase the risk,[186] it is necessary for the insurer, in order to avoid a policy conditioned to be void in case of false answers in the application, to show, if the risk has not been increased, that the answers were made with intent to deceive.[187] The Georgia code not only requires the utmost good faith to be observed in making contracts of insurance, but by force of its provisions the representations in the application are covenanted to be true, and although this is not held to mean that they are warranties vitiating the policy if untrue, whether material or not, yet if they vary from the truth and thereby the nature, extent, or character of the risk is changed, the policy will be vitiated if they are made the basis of the contract, without regard to the fact whether they are willfully and fraudulently made;[188] and under subsequent decisions in the same state it is decided that under its code a policy is not avoided by falsity of a warranty or representation, the subject matter of which is wholly immaterial to the risk.[189]

White v. Connecticut etc. L. Ins. Co., 4 Dill. (C. C.) 177. See Rev. Stats. Mo., 1879, sec. 5976; Rev. Stats. 1889, sec. 5849.

[185] Ring v. Phœnix Assur. Co., 145 Mass. 426; 14 N. E. Rep. 525, under Pub. Stats. Mass., c. 119, secs. 139, 181. See Acts Mass. 1887, c. 214, sec. 21.

[186] Mass Stats. 1887, c. 214, sec. 21.

[187] Levie v. Metropolitan L. Ins. Co., 163 Mass. 117; 39 N. E. Rep. 792.

[188] Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535.

[189] Mobile F. Department Ins. Co. v. Coleman, 58 Ga. 251; Mobile F. Department Ins. Co. v. Miller, 58 Ga. 420. See Georgia Code, 1882, secs. 2803, 2804.

Provisions requiring that the matters represented must be material to the risk to avoid the policy for misrepresentations, etc., exist in Maine,[190] New Hampshire,[191] Ohio,[192] and Pennsylvania,[193] and in a case in Maryland, where a stipulation in the contract made the application a part thereof and the answers therein material, and warranted them to be full, complete, and true, and further provided that the policy should be void if said statements were untrue, even though the same were made in good faith, notwithstanding any statutory provision to the contrary, it was held that such a stipulation could not be enforced so far as it conflicted with the terms of the statute; the policy in this case being issued by a Pennsylvania company.[194] If the criticisms of the courts in certain cases[195] are admitted to be just, they evidence the existence of a certain class of contracts which at the least are not based upon the good faith which is the basis of every contract of insurance, and it may therefore be reasonably assumed that the legislatures, in enacting statutes which are intended to avoid technical forfeitures, have had in view the benefit of the assured, and in construing the same the purpose of the legislature should be paramount.[196] In a line with the statutes above considered are enactments in many states the effect of which is substantially to exclude evidence of misrepresentations in the application, unless a copy of the application or representation is attached to or indorsed on the policy.[197]

§ 1917. Promissory Representations—Statement of Proposition.—The question has been much discussed whether

[190] Rev. Stats. 1883, p. 445, sec. 20.

[191] Laws 1885, c. 73.

[192] Rev. Stats. 1890, sec. 3625.

[193] Laws 1885, p. 134, sec. 1.

[194] Fidelity Mut. L. Assn. v. Fichlin, 74 Md. 172; 23 Atl. Rep. 197; affirming on rehearing, 21 Atl. Rep. 680.

[195] Combs v. Hannibal etc. Ins. Co., 43 Mo. 152; Delancey v. Rockingham, 52 N. H. 581.

[196] See Fidelity Mut. L. Assn. v. Fichlin, 74 Md. 172; 23 Atl. Rep. 197, above noted.

[197] Cook v. Federal L. Assn., 74 Iowa, 746; 35 N. W. Rep. 500; Metropolitan L. Ins. Co. v. Jenkins (Pa.), 10 Atl. Rep. 474; Dunbar v. Phœnix Ins. Co., 72 Wis. 492; 40 N. W. Rep. 386.

a representation not expressly or impliedly embodied in the contract can be promissory, or, in other words, whether one can be bound by a positive statement relating to a future fact or by a positive statement that a certain material fact shall or will thereafter exist, so that the policy will be avoided by the falsity thereof without regard to actual fraud, as much so as in the case of a positive representation of a past or existing material fact. Another point is also involved whether the statement is actually incorporated into and made a part of the policy by apt and proper words of reference or otherwise.[198]

[198] *Opinions of text-writers as to promissory representations.* The text-writers have as a rule divided positive representations into affirmative and promissory. Mr. Arnould makes this division, although he says the distinction "is one more of form than substance; as in fact most positive representations, even when in terms affirmative in effect, are promissory," and after a review of the cases, he concludes that it may "safely be laid down, as the conclusion to be derived from all the authorities, that the positive representation of a future fact material to the risks will, if false, avoid the policy, though it may not be actually fraudulent," and this is not changed in Mr. Maclachlan's edition of 1887 of Mr. Arnould's work: 1 Arnould on Marine Insurance, Perkins' ed. 1850, 506-11, *502-08, sec. 191; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 521-24. Mr. Duer makes the same division, and says the distinction was first made in terms by Mr. Marshall, and is clearly deducible from the cases that the majority of representations are promissory, and even though "affirmative in their terms, are promissory in spirit and intent; that is, while they assert the present existence of the facts they embrace, they imply a stipulation that the same facts shall continue to exist during the continuance of the risks." He reviews the cases and criticises the exhaustive opinion of Chancellor Walworth, in Alston v. Mechanics' Mut. Ins. Co., 4 Hill (N. Y.), 329, and denies that it expresses the existing law: 1 Duer on Marine Insurance, ed. 1845, 647, et seq., 749-69. Mr. May makes the same division, but concludes that "only those promissory representations are available . . . . . which are reduced to writing and made part of the contract" and in effect warranties: 1 May on Insurance, 3d ed., sec. 182. Mr. Biddle says: "Representations have been divided into two classes: affirmative and promissory. The former aver the actual existence of a fact, the latter that such fact shall thereafter exist. This distinction is however rather one of form than of substance, as in a large number of cases positive representations are in effect promissory" : 1 Biddle on Insurance, ed. 1893, 533. Mr. Parsons, who considers the question somewhat at length, says the whole subject "is involved in some obscurity," although he adds that there are numerous cases both in England and this country where "definite statements concerning fu-

§ 1919. Same Subject—Cases and Opinions.—A statement in the application that a force pump and an abundance of water constitute the facilities for extinguishing fire is held not to import a continuing guarantee that they shall be kept in good order for use, but only that such were the facilities at the time the insurance was effected.[199] And where one under an accident risk represented that he was a switchman, and the policy did not provide that he should not change his occupation, it was held immaterial that he was killed while acting as a brakeman, such answer not amounting to a contract that the insured would not change his occupation.[200] And where

ture facts made by the assured by way of representation are binding upon him"; beyond this he seems to be in doubt: 1 Parsons on Marine Insurance, ed. 1868, 445-48, et seq. Mr. Phillips says: "It is singular that this question respecting a promissory representation being obligatory should ever have been raised, since administrative jurisprudence abounds with instances of the deliberate recognition of the obligation imposed by such a representation. . . . . The representation is construed to be of the existing facts, and also of the continuance of them as far as this depends on the assured." And that the doctrine sanctioned by the weight of authority is "that a positive affirmative representation of material facts in respect to the future is, in effect, a stipulation that they shall be substantially as stated, and that a nonfulfillment of such representation will defeat the policy": 1 Phillips on Insurance, 3d ed., 299-303, sec. 553. Mr. Bliss briefly reviews the question, says it is involved in doubt, but that it is an implied condition that the contract is free from misrepresentation: Bliss on Life Insurance, ed. 1872, 66-8, sec. 49. Mr. Wood says that oral statements or representations as to future facts are inadmissible to alter or vary the contract or control its application or effect, unless they are proven fraudulent, or are made to induce the assurer to assume the risk or to lower the premium: 1 Wood on Fire Insurance, 2d ed., 550, et seq., sec. 227; relying upon Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 542, per Gray, J. Mr. Bacon considers the question, and concludes that "it is eminently reasonable, as well as consistent with authority, that promissory representations when false should avoid the contract only when they are either made under such circumstances that their breach substantially amounts to a fraud upon the insurer, or else when they are incorporated into the policy in such a way as to become virtually warranties": Bacon on Benefit Societies and Life Insurance, ed. 1888, 274-78, sec. 208. Mr. George M. Sharp, in his Lectures on Fire and Life Insurance, used in the Yale Law School, divides representations into affirmative and promissory.

[199] Gilliat v. Pawtucket etc. Ins. Co., 8 R. I. 282; 91 Am. Dec. 282; Daniels v. Hudson River Ins. Co., 12 Cush. (Mass.) 416.

[200] Providence etc. Ins. Co. v. Fennel, 49 Ill. 180; Valton v. National etc. L. Assur. Co., 17 Abb. Pr. (N. Y.) 268.

the application declared that the applicant did not then and would not practice any pernicious habits to shorten life, it was held, in the absence of a stipulation that the practice of such a habit should avoid the policy, that it did not amount to a covenant or warranty on his part that he would not do so in the future, but merely referred to a then existing state of facts, and as to the future, that it was a mere matter of intention which did not avoid the policy, and this even though the policy stipulated that if any of the statements or declarations made in the application should be found untrue in any respect, the policy should be void.[201] And where it was falsely but not fraudulently represented that the ship would only take as cargo a certain quantity of rock salt, which would put her in light ballast trim, and she sailed with over three times the quantity stated, the same constituting a full and very heavy cargo, a distinction was made between an affirmative and promissory representation, the jury being instructed in effect to find for the defendant if the statement amounted to an affirmative, material representation; otherwise for the plaintiff.[202] And where an application was made for a policy on "an occupied dwelling-house," it was held that while it might amount to a false representation if the property was unoccupied at the time, it was not an assertion that it should be occupied during the risk.[203] The leading case wherein it is deemed that a distinction exists between an affirmative and promissory warranty is Alston v. Mechanics' Mutual Insurance Company, [204] wherein

[201] Knecht v. Mutual L. Ins. Co., 90 Pa. St. 120; 35 Am. Rep. 641. But see Schultz v. Mutual Ins. Co., 6 Fed. Rep. 672, and examine Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47; Bilborough v. Insurance Co., 5 Duer (N. Y.), 587.

[202] Flinn v. Headlam, 9 Barn. & C. 694, per Lord Tenterden; Flinn v. Tobin, 1 Moody & M. 367. In this case the jury were instructed that fraudulent misrepresentation must be fraud, per Lord Tenterden. Mr. Arnould says of the distinction above made that it is unfounded in principle and not supported by the authorities: 1 Arnould on Marine Insurance, Perkins' ed. 1850, 507-09, *503-05; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 522, 523. See, also, 1 Duer on Marine Insurance, ed. 1845, 741, 742, 747, 749.

[203] Cumberland etc. Co. v. Douglas, 58 Pa. St. 419; 98 Am. Dec. 298.

[204] 4 Hill (N. Y.), 334.

Chancellor Walworth exhaustively considers the question and reviews carefully the authorities. He says in substance that he has been unable to find any case wherein the court has adopted such a distinction; that he has examined all the writers both here and in other countries; that Ellis is the only law-writer who has considered a representation as a contract between the parties;[205] that Lord Mansfield clearly repudiates the idea of a promissory representation.[206] He then reviews several cases[207] and deduces the conclusion that they show that such representations as relate to future facts are those which relate merely to matters of expectation or intention honestly made and not actually fraudulent, and not to collateral contracts or promissory representations, and that in the case before him the referees erred in receiving parol evidence of such an agreement to defeat the policy. On a line with this decision is the opinion of the court in a Massachusetts case,[208] who says: "A representation that a fact now exists may be either oral or written, for if it does not exist, there is nothing to which the contract can apply, but an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue, and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract." This judgment is cited with approval in a federal case as deciding "that an actual promise, if oral, cannot be given in evidence to defeat a policy that has once attached";[209] and the following extract from the opinion of the court in this last

[205] As noted above, Mr. Duer so considers it.

[206] Citing Bize v. Fletcher, reported in 1 Park on Insurance, 441.

[207] Macdowell v. Frazer, 1 Doug. 260; Currel v. Mississippi M. & F. Ins. Co., 9 La. 163; Dennistown v. Lillie, 3 Bligh. 202; Baxter v. New England Ins. Co., 3 Mass. 96; Rice v. New England M. Ins. Co., 4 Pick. (Mass.) 439; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200; Allegre's Admrs. v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; Whitney v. Mayer, 13 Mass. 172; Flinn v. Tobin, 1 Moody & M. 369.

[208] Kimball v. Ætna Ins. Co., 9 Allen, 540, facts noted above under this section.

[209] Albion Lead Works v. Williamsburgh City F. Ins. Co., 2 Fed. Rep. 479.

case is pertinent. The case was one where the application was oral, and it is said: "It is impossible to reconcile the decisions upon this question of continuing warranty. When an underwriter asks about the particulars of a risk, he probably takes for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided. The result, as far as I can gather it, is that when the fact appears to the courts to be a very important one, such as employment of a watchman, a majority of them have said, that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in a store, it is not of that character. There is great objection to these continuing warranties when they are conventional, or made up from words which do not purport a future warranty, because, if the attention of the assured had been called to them as continuing covenants, they might have been qualified. Thus, in the important case of Ripley v. Aetna Insurance Company,[210] which is in accordance with the weight of authority . . . . there was an oral statement that a watchman was at the mill day and night, and there was an oral description of the force pump. These statements were true at that time, and true at each renewal of the policy, and therefore it is of no consequence whether they are called warranties or representations. I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing. . . . . That covenants cannot be imported into or taken out of a written contract by parol is an elementary rule applicable to contracts for insurance as to others." [211] But where the vessel insured was represented to be American, it was held an implied condition

[210] 30 N. Y. 136.

[211] See Abbott v. Shawmut Mut. F. Ins. Co., 3 Allen (Mass.), 213; Schmidt v. Peoria Mut. Ins. Co., 41 Ill., 295; Higginson v. Dall, 13 Mass. 96; Kimball v. Ætna Ins. Co., 9 Allen (Mass.), 540; 85 Am. Dec. 786.

that she should carry the documents necessary to show her neutral character, and when she was condemned for want of the necessary documents a recovery was denied.[212] So in another case, the representation being that the ship would sail on a certain day, and she had already sailed, it was held a representation of a material fact and not of an expectation, and that the policy was avoided by the misrepresentation.[213] In another case it is held that oral statements made by the assured are merely representations, which if not fraudulent and material to the risk do not avoid the policy.[214] So it is held that the slip or application for insurance is inadmissible in evidence, in a court of law, to show the intention of the parties. It is proper evidence only to show a misrepresentation.[215]

§ 1920. Same Subject—Conclusion.—Excluding such cases as come within the terms of some statutory provisions establishing some definite rule, the authorities, as will be seen from the above cases, are clearly in conflict, nor shall we attempt, in view of the conflicting decisions, to formulate any certain rule. We would suggest, however, that the cases show three classes of representations: 1. Those which distinctly re-

[212] Steel v. Lacy, 3 Taunt. 285; Vandenhewell v. Church, 2 Johns. Cas. (N. Y.) 451; Murray v. Alsop, 3 Johns. Cas. (N. Y.) 47. But see sec. 1903, herein.

[213] Denniston v. Lillie, 3 Bligh P. C. 202. See also in connection with this point of promissory representations, Prudential Assur. Co. v. Ætna L. Ins. Co., 23 Blatchf. (C. C.) 223; Houghton v. Manufacturers' etc. Co., 8 Met. (Mass.) 120; Edwards v. Footner, 1 Camp. 530; Kimball v. Springfield F. & M. Ins. Co., 9 Allen (Mass.), 540; Gilbert v. Pawtucket Ins. Co., 8 R. I. 282; Fiese v. Parkinson, 4 Taunt. 337; Peoria etc. Ins. Co. v. Lewis, 18 Ill. 553; Driscoll v. Passmore, 1 Bos. & P. 200; Prudential Assur. Co. v. Ætna L. Ins. Co., 52 Conn. 576, and see next chapter.

[214] Wytheville Ins. etc Co. v. Stultz (Va.), 15 Va. L. J. 328; 13 S. E. Rep. 77.

[215] Dow v. Whitten, 8 Wend. (N. Y.) 160. The California code provides that "a representation as to the future is to be deemed a promise unless it appears that it was merely a statement of belief or expectation": Deering's Annot. Civ. Code Cal., sec. 2574. But it is also provided that " a representation cannot be allowed to qualify an express provision in a contract of insurance, but it may qualify an implied warranty: Deering's Annot. Civ. Code Cal., sec. 2575.

late to the future; 2. Those of facts which exist at the time the risk was taken, and upon which the insurer has sought to ingraft a promise that they shall so exist during the continuance of the risk; and 3. Those statements that are incorporated in the contract by clear words of reference or otherwise. In the first class of cases fraud, deceit, or misrepresentation may exist; in the second, the question of fraud, deceit, and misrepresentation may be eliminated by the fact that the representation was true when made and at the time the insurance was effected; while in the third class the stipulations of the contract determine largely the construction which should be given the words used and the effect of the statements made. In marine risks a certain fact may be not only clearly material to the risk in itself, but the insurer may without doubt have been induced to assume the contract or to lower the rate of premium because of the representation. In such case, although the statement may in terms refer to the future, yet it may be fairly said to actually relate back to the time of the commencement of the risk, so that it will avoid the contract either because it is fraudulent or materially false or calculated to deceive, and by reason of the fraud or material misrepresentation evidence of the actual representation would be deemed admissible. It is not evidence to vary a written contract, for the fraud and material misrepresentation vitiated the contract in its inception. Thus, where the vessel was represented as provided with a French license to trade, and it merely had a French pass which did not give the right to trade, the false statement was held to avoid the policy in its inception.[216] But if the representation be clearly of a future fact, as where the vessel is to sail in company with two armed ships and carry ten guns and twenty-five men,[217] this being material is clearly an implied condition, and if it is one upon which the risk was assumed, it must be observed, otherwise the minds of the parties have not met. If the ship sails alone or with less men, then the risk is not the one assumed, but another which the underwriter never agreed to run. The representa-

[216] Fiese v. Parkinson, 4 Taunt. 639.
[217] Edwards v. Footner, 1 Camp. 530.

tion once made is binding, or the life of the contract is gone. It is not a question in such case of altering or varying the contract by parol, and it can be clearly deduced from the language of Lord Ellenborough in charging the jury in the last case that the representation, although relating to the future, must be held to refer back to the time when it was made, and if untrue then and not altered or withdrawn, it must be substantially complied with. If the fact represented actually exists as stated at the time the contract is made, if there is then no deceit, fraud, or misrepresentation, to seek afterward to import into the written contract by parol evidence an agreement that the fact shall continue to exist as stated, when the parties have not seen fit to embody the same therein, would seem to conflict with established rules of law; but even then if the insurer was actually induced by the representation to enter into the contract or to lower the rate of premium, and the risk would be materially changed or increased if the facts represented did not continue to exist as they were when the insurance was effected, then the contract could perhaps be reasonably assumed not to be the actual contract entered into between the parties. If the representation be made in bad faith and with intent to mislead or deceive, of necessity the element of fraud vitiates the contract, but can it not be held to be a constructive fraud to induce the insurer to assume a risk, relying on the existence of facts material to the risk, and then when the contract is effected to increase the hazard by neglecting or refusing to continue the existence of the relied-upon facts? In such case are they made under such circumstances that the breach could reasonably be held to amount to a fraud upon the assurer? In many cases such reasoning would apply, but in numerous other cases, such as those of use and occupation hereafter noted, it is clearly evident from the character of the risk and the contract that a promissory warranty was not intended, and that a change will not avoid the contract unless it be shown that the risk is materially increased.

§ 1921. To what Time the Representation Refers.—A positive representation that a certain state of facts does or does

not exist and which is material will ordinarily refer to the time when the contract is completed, and it becomes binding at that time. Thus, where an application for insurance was made in writing on a named ship at and from Gibraltar, "where she now is," to a port in the Mediterranean, and the application was marked binding on the twelfth of the month, but on the fifteenth of the same month, and before the policy was delivered or notes sent for the premium, it was learned by both parties that before the application was made the ship was destroyed by fire at Gibraltar, it was held that the statement "where she now is" being untrue at the time the agreement was made "binding," there could be no recovery.[218] And although the representation relates to a future fact, it is distinctly held by Lord Ellenborough that such statement must be referred to the time when made, and must be substantially true by relation to that time, and if not altered or withdrawn before the policy is delivered, it binds the assured.[219] The point, however, whether statements, which relate to future facts must be referred to the time the contract was completed or to the truth of the representations when made is so far dependent upon the question as to the existence and effect of promissory representations, that we must refer the reader to the discussion of that question.[220]

§ **1922. Representation Falsified in the Future does not Operate Retroactively.**—The following rule is given by Mr. Duer: "When the policy has attached and the representation is falsified by a subsequent event the breach does not, by a retroactive force, render the policy void in its origin. It discharges the insurer from the time that it occurs, and does not release him from his liability for antecedent losses." [221] This rule is, however, based upon the proposition as to the ex-

[218] Callaghan v. Atlantic Ins. Co., 1 Edw. Ch. (N. Y.) 64. See next section.

[219] Edwards v. Footner, 1 Camp. 530.

[220] Sections 1917-20, herein. The California code provides that "the completion of a contract of insurance is the time to which a representation must be presumed to refer": Deering's Annot. Civ. Code Cal., sec. 2577.

[221] 2 Duer on Marine Insurance, ed. 1845, 696.

istence of continuing promissory representations just discussed.[222]

§ 1923. Representations True when Made, but Untrue when Policy Delivered.—It is held in Wisconsin that if material representations upon which the contract is based are true when made, but have ceased to be true when the policy is delivered, the contract is avoided, especially when it is stipulated in the application that false representations shall avoid the insurance and the answers are made warranties.[223] As long as the contract is not completed such a rule would be true, but if the contract is actually completed the fact that they have ceased to be true brings the discussion again within the question concerning promissory representations, unless the positive representation relates solely to the past or present existence of the facts relied on, in which case the representation must be referred to the time of the completion of the contract.[224] And in England after the slip has been initialed a representation made after that time and before the policy is drawn up and executed does not bind the insured.[225] And it has been decided on analogous principles in this country that if the contract is completed, neither the failure thereafter of the health of the person insured,[226] nor a subsequently occurring loss,[227] nor the happening of an accident[228] can defeat the contract, even though the policy has not been delivered, and also that after the contract is completed no obligation rests upon the assured to inform the insurers of a subsequently occurring loss before receiving the policy.[229]

[222] See secs. 1917-1920, herein.

[223] Blumer v. Phœnix Ins. Co., 45 Wis. 622.

[224] See preceding section.

[225] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 515, citing 30 Vict., c. 23; Ionides v. Pacific F. & M. Ins. Co., L. R. C. Q. B. 674; 7 Q. B. 517. See 1 Marshall on Insurance, ed. 1810, *452, as to former rule; Dawson v. Atty, 7 East, 367.

[226] Fried v. Royal Ins. Co., 50 N. Y. 243; 47 Barb. (N. Y.) 127.

[227] Insurance Co. v. Colt, 20 Wall. 560; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; reversing 6 Johns. Cas. (N. Y.) 485.

[228] Rhodes v. Railway Passengers' Ins. Co., 5 Lans. (N. Y.) 71.

[229] Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312. See secs. 1327, 1370, herein.

§ 1924. Representation must be Substantially True. What is material to the risk must be truly represented.[230] It is held that the positive representation of an existing fact is in the nature of a warranty,[231] and it is also decided in Massachusetts that a positive representation of a material existing fact in marine insurance must be literally true.[232] But the general rule is that material representations made in good faith and without intent to deceive need not be literally accurate, even as to material matters. It is sufficient if they are substantially true and correct as to existing circumstances, or, as it is sometimes expressed, they need be only materially true, for they will not vitiate the policy even though they be in some degree erroneous. So far as they may be held executory or promissory, it is sufficient if they are substantially complied with. Subject to the above qualifications representations of material facts must be just, true, and full, otherwise the company is not bound, and if they are materially different from the truth in a way that increases the risk, the company is released.[233] So it is declared that the description in the applica-

[230] Marshall v. Columbian Mut. F. Ins. Co., 27 N. H. 157.

[231] Herrick v. Union Mut. F. Ins. Co., 48 Me. 558; 77 Am. Dec. 244.

[232] Sawyer v. Coasters' Mut. Ins. Co., 6 Gray (Mass.), 221.

[233] Houghton v. Manufacturers' Ins. Co., 8 Met. (Mass.) 114; 41 Am. Dec. 489; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 51 Am. Dec. 309; Lycoming Ins. Co. v. Mitchell, 48 Me. 367; Callaghan v. Atlantic Ins. Co., 1 Edw. (N. Y.) 164; MacDowall v. Frazer, 1 Doug. 260; Farmers' Ins. Co. v. Snyder, 16 Wend. (N. Y.) 481; 30 Am. Dec. 118; Buford v. New York L. Ins. Co., 5 Or. 334; Edwards v. Footner, 1 Camp. 530; Hartford etc. Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 584; Bartholomew v. Merchants' Ins. Co., 25 Iowa, 507; Higbee v. Guardian Ins. Co., 16 Barb. (N. Y.) 462; Nicoll v. American Ins. Co., 3 Wood & M. 529; Lee v. Howard Mut. F. Ins. Co., 11 Cush. (Mass.) 324; Washington L. Ins. Co. v. Hawley, 10 Kan. 525; Pawson v. Watson, Coop. 785; 1 Doug. 11, n.; Irvin v. Lea Ins. Co., 22 Wend. (N. Y.) 380; Insurance Co. of North America v. McDowell, 50 Ill. 120; Chrisman v. State Ins. Co., 16 Or. 283; 18 Pac. Rep. 466; Kentucky etc. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634. Answers of an applicant for insurance ought to be construed liberally in his favor: Brown v. Metropolitan L. Ins. Co., 65 Mich. 306; 8 Am. St. Rep. 894. A representation "not embodied in the policy will not vitiate it, although erroneous, if it be fairly and substantially true, and does not prejudice the insurers": Hammond on Fire Insurance, ed. 1840, 89. The defense of misrepresentation must be clearly made

tion may vary considerably from the actual state of the property at the time of the loss, but if the variance was not fraudulently intended, and does not in fact affect the rate of insurance or change the actual risk, the policy will not be avoided.[234] So a representation is satisfied where buildings are declared to be "finished" and they are substantially completed,[235] and a statement as to occupancy need only be true so far as material to the risk.[236] So a representation that the ship had been metaled is substantially true where it appears that she had been metaled where needed.[237] A statement that the ship is at a certain port is satisfied although she is not at the town, but at another place which is legally within the port, although several miles distant,[238] and a representation that the ship will sail in ballast need only be substantially complied with; as where she sailed with only one trunk of merchandise and ten barrels of gunpowder.[239] In marine risks, however, there may be said to be degrees of strictness with which representations must be complied with. Thus, if the time of the ship's sailing be material to the risk, this is almost in effect a warranty, and must be correspondingly complied with; that

out. A representation, honestly made, must be materially and substantially incorrect to vitiate, but if made with intent to deceive, the fact that it is trivial or immaterial will not avail insured. So a vessel was an old one, but had been repaired, given a new name and register, but some of the old material and the original engine, boiler, and machinery remained, and she was represented as built in 1890. The policy was held vitiated by the misrepresentation, and this without regard to the intent to deceive: Nova Scotia Ins. Co. v. Stevenson, 23 Supr. C. R. (Can. 1) 37, Taschereau, J., dissenting. "It is a first principle of the law of insurance on all occasions, that where a representation is material, it must be complied with; if immaterial, that immateriality must be inquired into and shown, but if there is a warranty, it is part of the contract that the matter is such as it is represented to be, therefore the materiality or immateriality signifies nothing": Porter's Law of Insurance, 2d ed., 144.

[234] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72.

[235] Delonguemere v. Tradesman's Ins. Co., 2 Hall (N. Y.), 58.

[236] Boardman v. New Hampshire Mut. F. Ins. Co., 20 N. H. 551.

[237] Alexander v. Campbell, 41 L. J. Ch. 478.

[238] Bell v. Marine Ins. Co., 8 Serg. & R. 98.

[239] Luckley v. Delafield, 2 Caines (N. Y.), 222. See Flinn v. Tobin, 1 Moody & M. 366; Flinn v. Headlam, 9 Barn. & C. 694.

is, nearly as strictly or literally as if a warranty,[240] unless the risk as assumed by the underwriter has not been materially altered.[241] And in cases where the stipulations of the policy make the representations in the nature of warranties, a stricter rule exists, since the materiality of the fact is held not then a subject of inquiry,[242] although where inquiries are made and the application and survey are made a part of the policy, it is held that a representation as to a watchman being kept is material to the risk, but need only be substantially performed.[243] If the representation is one which may be implied from the terms of the policy, and is one not expressly made when the policy was effected, and it was known by the assured when the policy was effected that it was false, the underwriter is not bound.[244]

§ 1925. Loss Need not be Connected with Misrepresentation to Avoid Contract.—Although a false representation of something outside and independent of the property insured, which has not in any degree contributed to the loss, will not avoid the contract,[245] nevertheless if there be actual fraud or the misrepresentation be of a material fact, the question whether the statement has contributed to the loss or whether the loss is dependent thereon in any way is precluded.[246]

[240] Kirby v. Smith, 1 Barn. & Ald. 674; Murray v. Alsop, 3 Johns. Cas. (N. Y.) 47; Chamand v. Augerstein, Peake N. P. 43.

[241] Bize v. Fletcher, Doug. 284.

[242] Mutual B. L. Ins. Co. v. Miller, 39 Ind. 475.

[243] Sheldon v. Hartford F. Ins. Co., 22 Conn. 335.

[244] Reid v. Hawey, 4 Cow. 97.

[245] Howard F. & M. Ins. Co. v. Cornick, 24 Ill. 455.

[246] Mr. Marshall says: "A representation may be untrue either willfully and fraudulently, or inadvertently and innocently, and in either case, if it be a material representation, it will avoid the policy. A willful misrepresentation or allegation false in any fact or circumstance material to the risk is a fraud that will always avoid the contract, ... and such misrepresentation so completely vitiates the policy, that the insured can never recover upon it, even from a loss arising from a cause unconnected with the fact or circumstance misrepresented, as if the insured represent that the ship or goods insured are neutral property, he shall not recover, even for a loss occasioned by shipwreck": 1 Marshall on Insurance, ed. 1810,

§ 1926. Misrepresentations to Other Insurers.—In England, in cases of insurances effected at Lloyds where successive underwriters initial the slip, it seems to be settled law that a misrepresentation made to the first underwriter infects the whole policy, and is considered a misrepresentation made to every underwriter; the ground of this being that where the name of a respectable underwriter appears first on the policy or slip, the rest subscribe upon reliance thereon.[247] This rule, however, does not cover immaterial representations, nor those which ought to have put the first underwriter on inquiry, nor those made to other than the first underwriter, nor to underwriters on different policies, nor to cases other than those where the other underwriters are induced thereby to lower the premium.[248] The English courts, however, have been inclined to limit the rule even in the cases not within the exceptions,[249] although Mr. Duer favors strict adherence thereto.[250] In this country the rule is that a representation to one insurer cannot be evidence of a like representation to another insurer, on a different policy, on the same ship and risks.[251]

*453, citing Skin. 327, per Holt, C. J. See, also, 1 Arnould on Marine Insurance, Perkins' ed. 1850, 505, *501, 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 520; 3 Kent's Commentaries, 5th ed., 282.

[247] The cases on the point are Forrester v. Pigou, 1 Maule & S. 13; Marsden v. Reid, 3 East, 572; Robertson v. Majoribanks, 2 Starkie, 803; Pawson v. Watson, 2 Cowp. 785, per Lord Mansfield; Libbald v. Hill, 2 Dow, 263; Bell v. Carstairs, 2 Camp. 543; Elting v. Scott, 2 Johns. (N. Y.) 156; Barber v. Fletcher, 1 Doug. 306; Hincly v. South Carolina Ins. Co., 1 Wills' Const. (S. C.) 154; 1 Marshall on Insurance, ed., 1810, *455; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 535-39, *532-36, sec. 198; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 544, et seq.; 2 Duer on Marine Insurance, ed. 1846, 673, et seq.; 3 Kent's Commentaries, 5th ed., 284; 1 Phillips on Insurance, 3d ed., 303, et seq., secs. 554, 555.

[248] This is substantially the division made by Mr. Arnould and Mr. Duer, and see authorities last note; Brine v. Featherstone, 4 Taunt. 891.

[249] Brine v. Featherstone, 4 Taunt. 891; Forrester v. Pigou, 1 Maule & S. 13.

[250] 2 Duer on Marine Insurance, ed. 1846, 676.

[251] Etting v. Scott, 2 Johns. (N. Y.) 157; Nicoll v. American Ins. Co., 3 Woodb. & M. 529; Harmony etc. Ins. Co. v. Hazlehurst, 30 Md. 380; Vilas v. New York Cent. Ins. Co., 72 N. Y. 590; 16 N. Y. Sup. Ct. 121.

§ **1927. Representation must not be Evasive.**—A positive representation of a material fact must be full and true, and if it is evasive and not full and complete, and materially untrue, the policy is avoided; as where the insured, in response to an inquiry whether any company had refused to accept the risk, replied that he had been and still was corresponding with another company, when in fact eight companies had refused the risk and several proposals for insurance were then pending, the policy was held void.[252]

§ **1928. Statements Volunteered and Irrelevant—Irresponsive Answers.**—Where inquiries are made and the answer is complete thereto, and additional facts are volunteered which are irrelevant and irresponsive, the insurer cannot avail himself of the same in defense of an action on the policy, although if the facts stated are material the rule would be otherwise.[253] An answer which is not responsive to the inquiry is not fatal unless it appears that the information sought was material to the risk, and this must be proven by the insurer.[254]

§ **1929. Ambiguous or Doubtful Representations.**—If the representations are ambiguous or doubtful, the insurer should make further inquiry if it intends to bind the assured, otherwise the assured is not affected by the ambiguous or doubtful statement. This rule should, however, be taken with the qualification that the representation must not be intentionally ambiguous, but only refers to those cases where the statement is so doubtful and obscure upon its face that a prudent and intelligent underwriter would have naturally asked for further information, or be deemed by his neglect so to do to have waived the ambiguity or its incompleteness.[255] A rep-

[252] In re General Provincial L. Assur. Co. (Ex parte Damtrel), 18 Week Rep. 396. See, also, Vose v. Eagle etc. Ins. Co., 6 Cush. (Mass.) 42.

[253] Buell v. Connecticut Mut. L. Ins. Co., 2 Flip. (U. S.) 9; 5 Ins. L. J. 274.

[254] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416.

[255] See Elliott v. Hamilton etc. Ins. Co., 13 Gray (Mass.), 139; Brine v. Featherstone, 4 Taunt. 869; Nichols v. Fayette Ins. Co., 1 Allen (Mass.), 63; Gournlock v. Manufacturers' etc. Mut. F. Ins. Co., 43

resentation which does not fully and completely state the facts with relation to connected buildings does not avoid the policy, unless the partial misrepresentation is of a fact which increases the risk.[256]

§ 1930. Answers to Ambiguous or Doubtful Questions. If the assured in good faith answers questions which are ambiguous, doubtful, or obscure, the representations will be construed in favor of the assured and against the assurer.[257]

§ 1931. Representations False as to Part of the Property—Entire or Severable Contract.—In certain cases of insurance upon different classes of property, such as real and personal, and the risk has been held entire, it has been decided that a representation which is false as to part of the property avoids the entire contract, even though there be a separate valuation.[258] In Nebraska, a fire insurance policy for which a gross premium is paid and which covers real estate and various classes of personal property, the latter not specifically named, is not entire.[259] Again, where a separate valuation was put upon the dwelling-house, household furniture, and barn, and another on livestock, the contract was held severable and not entire.[260] In Arkansas, the general rule applies to insurance policies that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire.[261] In Texas, if a build-

U. C. Q. B. 563; Freeland v. Glover, 7 East, 462; Sexton v. Montgomery Ins. Co., 9 Barb. (N. Y.) 19; Connecticut Mut. L. Ins. Co. v. Leuchs, 108 U. S. 498; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 535; Davis v. Scottish Prov. Ins. Co., 16 U. C. C. P. 176; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 531, *528; 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 540.

[256] Stetson v. Massachusetts Mut. F. Ins. Co., 4 Mass. 330.

[257] Wilson v. Hampden F. Ins. Co., 4 R. I. 159.

[258] Schmitsch v. American Ins. Co., 48 Wis. 26; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; overruling French v. Chinango Co. Mut. Ins. Co., 7 Hill (N. Y.), 1222. See contra N. Y. cases noted below.

[259] State Ins. Co. v. Schreck, 27 Neb. 527; 20 Am. St. Rep. 696.

[260] Phœnix Ins. Co. v. Grunes, 33 Neb. 340; 50 N. W. Rep. 168.

[261] McQueeny v. Phœnix Ins. Co., 52 Ark. 257; 20 Am. St. Rep. 179. In this case the court per Hemingway J., cites as holding that the

ing and certain articles of personalty therein are separately valued and insured for specific sums, and the premium paid for the insurance is a gross sum, the policy is indivisible.[262] In Michigan, it is held that a policy upon real and personal property is not a divisible contract, part of which may remain in force though the rest be invalid, where it is not perfectly clear that the insurer would not have assumed both risks separately.[263] It is also held in Maine that when the consideration for a policy of insurance against fire is single, and the amount assured a gross sum, the contract is entire, although the sum assured is apportioned among several specific items of the property covered; and therefore a breach of the conditions of the policy as to one item avoids the whole policy.[264] In Wisconsin a policy of insurance covering several lots of personal property in the same building and distributing the risk to each item, but providing for the payment of a gross sum as premium, creates

contract is entire when a gross sum is paid for the premium: 2 Parsons on Contracts, 519; Johnson v. Johnson, 3 Bos. & P. 162; Miner v. Bradley, 22 Pick. (Mass.) 457; McClurg v. Price, 59 Pa. St. 420; May on Insurance, secs. 189, 277; 1 Wood on Insurance, 384; Day v. Charter Oak Ins. Co., 51 Me. 91; Lovejoy v. Augusta, 45 Me. 472; Richardson v. Marine Ins. Co., 46 Me. 394; Friesmuth v. Agamon Ins. Co., 10 Cush. (Mass.) 587; Kimball v. Howard Ins. Co., 3 Gray (Mass.), 583; Goltsman v. Insurance Co., 56 Pa. St. 210; Fire Assn. v. Williamson, 26 Pa. St. 196; Associated F. Ins. Co. v. Assum, 5 Md. 165; Bowman v. Franklin Ins. Co., 40 Md. 620; Moore v. Virginia F. Ins. Co., 28 Gratt. (Va.) 508; Hinman v. Hartford Ins. Co., 36 Wis. 159; Schumtsch v. Assurance Ins. Co., 48 Wis. 26; Ætna Ins. Co. v. Rash, 44 Mich. 25; Plath v. Minn. Ins. Co., 23 Minn. 429; McGowen v. People's Mut. F. Ins. Co., 54 Vt. 211; Baldwin v. Hartford Ins. Co., 60 N. H. 422; Bryan v. Peabody Ins. Co., 8 W. Va. 605; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; contra, Merrill v. Agr. Ins. Co., 73 N. Y. 462; Peoria etc. v. Aunpavis, 51 Ill. 283; Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; Koontz v. Hannibal etc., 42 Mo. 126; Lochner v. Home Mut. Ins. Co., 19 Mo. 628; State Ins. Co. v. Schreck, 43 N. W. Rep. 340.

[262] Bills v. Hibernia Ins. Co., 87 Tex. 547; 47 Am. St. Rep. 121.

[263] Ætna Ins. Co. v. Resh, 44 Mich. 55; 38 Am. Rep. 228. See, also, Brown v. People's Mut. Ins. Co., 11 Cush. (Mass.) 280.

[264] Plath v. Minnesota Farmers' Mut. F. Ins. Assn., 23 Minn. 479; 23 Am. Rep. 697. See Gould v. Mutual F. Ins. Co., 47 Me. 403; 74 Am. Dec. 494; Lovejoy v. Augusta etc. Ins. Co., 45 Me. 472.

an entire, indivisible contract.[265] So it is held in Alabama that an insurance on personal property is avoided where the policy is void, as to the building in which the personal property is situated, on account of misrepresentations.[266] In Indiana, where property covered by insurance, although consisting of separate items, constitutes substantially one risk and is necessarily subject to destruction by the same fire, then, even though separate amounts of insurance are apportioned to each separate item or class of property, if the consideration of the contract and the risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner.[267] Although it is also decided in the same state that where property insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy is to be regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is to be regarded as several and divisible.[268] The valuation of lemons in boxes at so much per box, insured as the cargo of a ship by a single contract on the whole, does not make the insurance an insurance on each box.[269] Other cases, however, hold the contract severable.[270] In Kansas, if insurance is effected upon real and personal property by a policy showing the amount for which each is insured, and that the premium is a gross sum, the contract is divisible.[271] In Kentucky, where a house and goods are insured for separate

[265] Burr v. German Ins. Co., 84 Wis. 76; 36 Am. St. Rep. 905.

[266] Western Assur. Co. v. Stoddard, 88 Ala. 606; 7 So. Rep. 379.

[267] Geiss v. Franklin Ins. Co., 123 Ind. 172; 18 Am. St. Rep. 324; 24 N. E. Rep. 99.

[268] Phœnix Ins. Co. v. Pickel, 119 Ind. 155, 291; 12 Am. St. Rep. 393; 21 N. E. Rep. 898. But see Phœnix Ins. Co. v. Lounz (Ind. 1892), 29 N. E. Rep. 604.

[269] Hernandez v. Sun etc. Ins. Co., 6 Blatchf. (C. C.) 317.

[270] Coleman v. New Orleans Ins. Co., 49 Ohio St. 310; 31 N. E. Rep. 279.

[271] German Ins. Co. v. York, 48 Kan. 488; 30 Am. St. Rep. 313; 29 Pac. Rep. 586; 21 Ins. L. J. 206.

sums, though the insurance on the house may be void, an incorrect description of the interest of the insured will not vitiate the insurance on the goods in the absence of proof that the house was insured for a fraudulent purpose, or that the incorrect description of the interest of the insured in the house induced the insurer to insure the goods.[272] So it is held in Missouri that the assured could recover the value of personalty insured though there was a false warranty as to encumbrances on the realty covered by the same policy, which was therefore void as to the realty where the personalty was separately valued and appraised, and there was nothing to show that the representation as to encumbrances on the realty formed any inducement to the execution of the policy covering the personalty.[273] In another case in the same state it is held that a breach of condition as to part of the property, which is a subject of insurance, by a change in the title thereto does not avoid the whole policy.[274] In Ohio, where a policy insured goods and a storehouse for specified sums each, it was decided that the contract was severable.[275] The rule declared in New York seems to be this, that if specific amounts are

[272] Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

[273] Koontz v. Hannibal S. & I. Co., 42 Mo. 126; 97 Am. Dec. 325; Lochner v. Hane Mut. Ins. Co., 17 Mo. 247.

[274] Trabue v. Dwelling-house Ins. Co., 121 Mo. 75; 42 Am. St. Rep. 523.

[275] Coleman v. New Orleans Ins. Co., 49 Ohio St. 310; 31 N. E. Rep. 279. And it was declared in this case that the principle by which the courts are governed when they declare that a contract about several things, but with a single consideration in gross, is entire and not severable, is that it is impossible to affirm that the party making the contract would have consented to do so, unless he had supposed that the rights to be acquired thereunder would extend to all the things in question, and that a contract of insurance of two or more kinds of property, which are specifically appraised and valued in the policy, will be deemed severable and not entire, unless there is something in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance from which it may be inferred that the insurer would not have been likely to have assumed the risk on one of several of them, unless induced by the advantage and profit of having a risk on all. Hence the effect of that breach may be confined to the insurance upon that property, and the contract as to that held void, and as to the other subjects held valid.

insured on separate items of property the contract is severable.[276] But if real or personal property is insured, and it clearly appears from the stipulations of the policy that the entire contract and every part of it shall be void if certain material facts relating to the real or personal property or any part of it are not stated as required, or are misrepresented, then the contract is entire. Thus, where the contract stipulates that if the real or personal property or any part of it is encumbered, it must be so represented, otherwise the insurance will be void, the contract is not severable, and a misrepresentation of the situation of one of the subjects will invalidate the insurance on all other property.[277] Under a recent New York decision a policy insuring a stock of goods and store fixtures in separate amounts is a divisible contract.[278] Under a policy upon several distinct species of property, each of which is separately valued and the sum total of the valuations insured on payment of a premium in gross, the contract is severable, and a breach avoiding the policy as to one of the items does not affect it as to the others, at least where there are no grounds for inferring that the insurer would not have assumed the risk on one or several of the subjects of insurance unless induced by the advantage of having a risk upon all.[279] A policy upon a house for a certain amount and upon the contents of the house for another specified sum is a divisible contract,[280]

[276] Merrill v. Agricultural Ins. Co., 73 N. Y. 452; Schuster v. Dutchess Co. Ins. Co., 102 N. Y. 260; Herrman v. Adriatic F. Ins. Co., 85 N. Y. 162; Woodward v. Republic F. Ins. Co., 32 Hun (N. Y.), 365; French v. Chenango Mut. Ins. Co., 7 Hill (N. Y.), 122. See. also. Baldwin v. Hartford F. Ins. Co., 60 N. H. 422, all cited in Smith v. Agricultural Ins. Co., 118 N. Y. 522; per Follett, C. J.

[277] Smith v. Agricultural Ins. Co., 118 N. Y. 522; 29 N. Y. St. Rep. 810; 23 N. E. Rep. 883. The court distinguishes cases of the character cited under the last note.

[278] Adler v. Germania F. Ins. Co. (N. Y. Supr. Ct. App. Div. 1896), 39 N. Y. Supp. 1070. See Driggs v. Albany Ins. Co., 10 Barb. (N. Y.) 440; German Ins. Co. v. Fairbank, 32 Neb. 750; 49 N. W. Rep. 711; Clark v. New England Mut. F. Ins. Co., 6 Cush. (Mass.) 342.

[279] Merrill v. Agricultural Ins. Co., 73 N. Y. 452. See, also, Pratt v. Dwelling House Mut. F. Ins. Co., 130 N. Y. 206; 41 N. Y. St. Rep. 303; 21 Ins. L. J. 146; reversing 6 N. Y. Supp. 78.

[280] Kiernan v. Agricultural Ins. Co., 81 Hun (N. Y.), 373; 30 N. Y. Supp. 892; 63 N. Y. St. Rep. 146.

but a policy which is founded upon any illegality in which one of the owners participates is void as to all, for the contract is not in this respect divisible so as to be good in part and bad in part.[281] In Virginia, it is held that when a policy of fire insurance covering sixteen tenement houses, with a separate valuation on each, provides that if the premises remain unoccupied for twenty days without the consent of the insurer the policy shall be void, no recovery can be had, in case of a total loss, for such of the houses as have remained vacant beyond twenty days without the insurer's consent after the insurance has attached; nor is the condition waived by the insurer because its issuance was at the time when the entire premises were unoccupied.[282] In a case in the appellate court of Illinois a policy insuring a house for four hundred and fifty dollars and the contents thereof for one hundred and fifty dollars is held to be a divisible contract.[283]

§ 1932. Representations of Third Parties—Parties Referred to.—It is held that the representations of third parties cannot bind the assured, even though relied upon by the insurer, where they are not furnished by the assured or the party to whom the policy is payable, and the application is not based thereon. Such answers to third parties are not warranties.[284] But where the insured refers to a medical attendant to answer inquiries concerning his health, he is responsible for the truth of his answers.[285] The insured is not bound by the oral statements of the clerk of the broker who procured the insurance made to the agent of the company where the application is in writing,[286] and the fact that the in-

[281] Clark v. Protection Ins. Co., 1 Story (U. S.), 109. See secs. 2253-56, herein, "Alienation."

[282] Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024; 29 Am. St. Rep. 770; 14 S. E. Rep. 831; 21 Ins. L. J. 558.

[283] Continental Ins. Co. v. Chew, 11 Ind. App. 330; 38 N. E. Rep. 417.

[284] Rawls v. American L. Ins. Co., 27 N. Y. 282; 36 Barb. (N. Y.) 357.

[285] Abbott v. Howard, Hayes, 311; Smith v. Ætna L. Ins. Co., 49 N. Y. 211.

[286] Dolliver v. St. Joseph F. & Mar. Ins. Co., 131 Mass. 39.

sured has referred to another does not excuse the material falsity of the assured's answers, nor his neglect to make a full and true disclosure of material facts,[287] although it is held that the assured in such cases does not become responsible for the fraudulent misrepresentations of the party to whom the reference is made in the absence of stipulations to the contrary.[288]

§ 1933. Representations may be Changed, Modified, Altered or Withdrawn.—The assured may change, modify, alter or withdraw a representation made by him at any time before the policy is subscribed or before the contract is completed, provided in the first case that the contract is not completed before the policy is signed, and this change may be expressly made or impliedly arise from a subsequent statement qualifying or controlling the first statement; provided, however, that in those cases where the contract is completed and the commencement of the risk depends upon the present or past existence of facts stated, such facts being vital to the risk, the contract is avoided by the substantial falsity of the representations.[289] The rule above stated differs from that of Mr. Arnould, who makes the period of withdrawal or alteration any time before the policy is signed.[290] But in England, as already noted, it was only by act of 30 Victoria, chapter 23, passed in 1867, that the slip was admissible in evidence even to show the intentions of the parties, and therefore the reason for Mr. Arnould's opinion is easily seen, and although Mr. Maclachlan says the contract is so far completed when the slip is initialed that representations made after their common consent has been thus ascertained and expressed, are of no effect

[287] Everett v. Disborough, 5 Bing. 503; 3 Moore & P. 190; 7 L. J. C. P. 223. See Forbes v. Edinborough L. Assur. Co., 10 Shaw & D. 451.

[288] Wheelton v. Hardesty, 8 El. & B. 232.

[289] Edwards v. Footner, 1 Camp. 530, where Lord Ellenborough says: "If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterward altered or withdrawn": Dawson v. Atty. 7 East, 366; Carter v. Boehm, 3 Burr. 1905; 1 W. Black. 593. "A representation may be altered or withdrawn before the insurance is effected, but not afterwards": Deering's Annot. Civ. Code Cal., sec. 2576.

[290] 1 Arnould on Marine Insurance, Perkins' ed. 1850, 528, *524.

on a policy made in accordance with the slip, nevertheless he also says the representations of the assured may be altered or withdrawn at any time before the policy is signed;[291] the reasons probably being that there are certain additions requisite to the actual validity of the contract after the slip is initialed. But the reason of the rule does not obtain here.[292]

§ **1934. Construction of Representation.**—If the policy refers to the application only in stipulating that the warranties therein constitute the consideration, the statement of what the insured's understanding "will extend to" is not a statement of fact, but one of law, and does not control the legal construction of the policy.[293] The express warranties of the policy are not limited or defeated by the stipulation in the contract that the application is a part thereof, and that any false or untrue answers or statements will, so far as material to the risk, avoid the policy.[294] If the words used have a plain and obvious meaning, it will govern.[295] Words will sometimes be given a meaning by relation to other matters; as where goods are held to be neutral by reason of the representation by the owner that they are his own goods, he being a resident of a neutral country.[296] It is also held that representations are to be construed with reference to the requirements of the underwriters, and a mere literal conformity therewith is not necessarily sufficient.[297] If one part of the contract expressly stipulates a warranty and another part, namely, "the policy characterizes the statements as representations," the terms of the policy control as against the application; that is, that construction prevails which protects the in-

[291] 1 Arnould on Marine Insurance, Maclachlan's ed. 1887, 515, 538, 543.

[292] See sec. 1923, herein.

[293] Accident Ins. Co. v. Crandal, 120 U. S. 527; 7 S. Ct. 685.

[294] Chrissman v. State Ins. Co., 16 Or. 283; 18 Pac. Rep. 466.

[295] Libbald v. Hill, 2 Dowl. Pr. 263, per Lord Eldon; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 535.

[296] Vanderheuvel v. United Ins. Co., 2 Johns. Cas. (N. Y.) 451.

[297] Houghton v. Manufacturers' etc. Ins. Co., 8 Met. (Mass.) 114; 41 Am. Dec. 489.

sured against the obligations of a warranty.[298] In guarantee insurance the rule as to representations seems from the nature of the contract not to be so strictly enforced as in marine risks.[299] Again, it is universally held that in no class of insurance risks will warranties be held to be created or extended by construction, nor will a warranty of the truth of representations be extended beyond what it was evidently intended by the parties to embrace.[300] So in case of inconsistency and doubt statements will be construed as representations, rather than warranties,[301] and the reason and justice of such a rule, as well as the rule which favors a liberal construction in behalf of the assured, is apparent when it is considered that a warranty must, as a rule, be literally fulfilled in its terms, and a breach thereof, however slight, determines the contract. It may, therefore, be reasonably assumed that the insured never meant to bind himself by a stipulation thus rigid in its exactions, except it clearly appears that such was the intent, and that the words used plainly, if not necessarily, exclude the theory that a representation only was intended. Courts do not favor warranties, and will incline against a construction which imposes upon the assured so strict an obligation as a warranty imposes, or, in other words, a warranty will not be implied by construction alone, but must be expressed.[302]

[298] Mouler v. American L. Ins. Co., 111 U. S. 335, 342, 343, per Harlan, J., cited in Weil v. New York L. Ins. Co., 47 La. Ann., pt. 2, 1405, 1418, per Watkins, J. See Fitch v. American P. L. Ins. Co., 59 N. Y. 557; 17 Am. Rep. 372; Continental L. Ins. Co. v. Rogers (Ill.), 10 N. E. Rep. 242.

[299] Towle v. National Guardian Assur. Soc., 7 Jur., N. S., 1109; 30 L. J. Ch. 900; Benham v. United Guardian & L. Ins. Co., 7 Exch. 744; 21 L. J. Ex. 317; Hamilton v. Watson, 12 Clark & F. 109; Lee v. Jones, 14 Com. B., N. S., 386. But see Bonar v. MacDonald, 3 H. of L. Cas. 226.

[300] See Howard F. & M. Ins. Co. v. Cormick, 24 Ill. 455; Mutual B. L. Ins. Co. v. Robertson, 59 Ill. 123; National Bank v. Insurance Co., 95 U. S. 673.

[301] Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467; 60 Am. Rep. 112.

[302] Pawson v. Watson, Cowp. 785; Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 215; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Mutual etc. Ins. Co. v. Robertson, 59 Ill. 123; Campbell v. New England Mut. L. Ins. Co., 98 Mass. 389; Price v.

§ 1935. Rules as to Representations Apply to Modification of Contract.—There is no doubt but that the same general rules which govern representations under the original contract would apply to a modification or alteration thereof, and it is so expressly provided by some statutes.[303]

Phœnix Mut. L. Ins. Co., 17 Ill. 497; 10 Am. Rep. 166; American Popular L. Ins. Co. v. Day, 39 N. J. L. 89; 23 Am. Rep. 198; Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133; Jefferson v. Cotheal, 7 Wend. (N. Y.) 72; 22 Am. Dec. 571; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 494; Chrisman v. State Ins. Co. (Or.), 18 Pac. Rep. 466; Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47; National Bank v. Insurance Co., 95 U. S. 678; Deering's Annot Civ. Code Cal., sec. 2573.

[303] "The provisions of this article apply as well to a modification of a contract of insurance, as to its original formation: Deering's Annot. Civ. Code Cal., sec. 2582.

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